

(9)

No. 94-562-CFX
Status: GRANTED

Title: Leslie Wilton, etc., et al., Petitioners
v.
Seven Falls Company, et al.

Docketed: September 27, 1994 Court: United States Court of Appeals for
the Fifth Circuit

Counsel for petitioner: Orlando, Michael A.

Counsel for respondent: Powers, Werner A.

Entry	Date	Note	Proceedings and Orders
1	Sep 27 1994	G	Petition for writ of certiorari filed.
3	Oct 28 1994		Brief of respondents Seven Falls Company, et al. in opposition filed.
2	Nov 2 1994		DISTRIBUTED. November 23, 1994 (Page 2)
4	Nov 28 1994		Petition GRANTED. Justice Breyer OUT. *****
5	Dec 15 1994		Record filed.
	*		Partial record proceedings United States Court of Appeals for the Fifth Circuit.
6	Dec 20 1994		Record filed.
			Original record proceedings United States District Court for the Southern District of Texas.
7	Jan 11 1995		Joint appendix filed.
8	Jan 11 1995		Brief of petitioners Leslie Wilton, et al. filed.
9	Jan 12 1995		Brief amicus curiae of Maritime Law Association filed.
11	Jan 12 1995		Brief amicus curiae of Insurance Environmental Litigation Association filed.
10	Jan 30 1995		SET FOR ARGUMENT MONDAY, MARCH 27, 1995. (2ND CASE).
12	Feb 1 1995		CIRCULATED.
13	Feb 13 1995	X	Brief of respondents filed.
14	Mar 14 1995	X	Reply brief of petitioners filed.
15	Mar 27 1995		ARGUED.

No. 94 562 SEP 27 1994

In The OFFICE OF THE CLERK

Supreme Court of the United States

October Term, 1994

LESLIE WILTON, ON BEHALF OF HIMSELF AND AS A
REPRESENTATIVE OF CERTAIN UNDERWRITERS AT
LLOYD'S OF LONDON, AND CERTAIN INSTITUTE OF
LONDON UNDERWRITERS COMPANIES, AS FOLLOWS, THE
ORION INSURANCE COMPANY, PLC, SKANDIA U.K.

INSURANCE PLC, THE YASUDA FIRE & MARINE
INSURANCE COMPANY OF EUROPE, LTD., OCEAN
MARINE INSURANCE CO., LTD., YORKSHIRE INSURANCE
CO., LTD., MINSTER INSURANCE CO., LTD., PRUDENTIAL
ASSURANCE CO., LTD., PEARL ASSURANCE PLC,
BISHOPSGATE INSURANCE LTD., HANSA MARINE INS. CO.
(UK) LTD., VESTA (UK) INS. CO., LTD., NORTHERN
ASSURANCE CO., LTD., CORNHILL INSURANCE CO., LTD.,
SIRIUS INSURANCE CO., (UK) LTD., SOVEREIGN MARINE &
GENERAL INSURANCE CO., TOKIO MARINE & FIRE
INSURANCE (UK) LTD., TAISHO MARINE & FIRE
INSURANCE CO. (UK) LTD., STOREBRAND INSURANCE CO.
(UK) LTD., ATLANTIC MUTUAL INSURANCE CO., ALLIANZ
INTERNATIONAL INSURANCE CO., LTD., AND WAUSAU
INSURANCE CO. (UK) LTD.,

versus

Petitioners,

SEVEN FALLS COMPANY, MARGARET HUNT HILL,
ESTATE OF A. G. HILL, LYDA HILL, ALINDA H. WIKERT,
AND U.S. FINANCIAL CORP.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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APP

QUESTIONS PRESENTED

- I. In reviewing a decision by a district court to abstain from exercising federal jurisdiction in a declaratory judgment action, should the court of appeals determine the abstention issue *de novo*, or on the basis of whether the district court abused its discretion?
- II. May a federal district court that has diversity jurisdiction over a declaratory judgment action abstain from exercising that jurisdiction in light of a later-filed action in a state court?

LIST OF PARTIES

All Petitioners named in the caption of this case were parties plaintiff to the proceedings below and constitute all those that have a direct interest in the judgment sought to be reviewed; Petitioners' corporate parents and nonwholly owned subsidiaries include:

1. ING Group NV (Netherlands), ultimate parent of The Orion Insurance Company, PLC;
2. Skandia Group (Sweden), ultimate parent of Skandia U.K. Insurance PLC;
3. Yasuda (Japan), ultimate parent of The Yasuda Fire & Marine Insurance Company of Europe, Ltd.;
4. Commercial Union PLC, ultimate parent of Ocean Marine Insurance Co., Ltd.;
5. General Accident PLC, ultimate parent of Yorkshire Insurance Co., Ltd.;
6. Societe Centrale du Groupe des Assurances Nationales, ultimate parent of Minster Insurance Co., Ltd.;
7. Prudential Corporation PLC, ultimate parent of Prudential Assurance Co., Ltd.;
8. Australian Mutual Provident Society, ultimate parent of Pearl Assurance PLC;
9. AMEV, ultimate parent of Bishopsgate Insurance Ltd.;
10. Tyrgg Hansa SSP Holding (Sweden), ultimate parent of Hansa Marine Ins. Co. (UK) Ltd.;

LIST OF PARTIES – Continued

11. Skandia Group (Sweden), ultimate parent of Vesta (UK) Ins. Co., Ltd.;
12. Commercial Union PLC, ultimate parent of Northern Assurance Co., Ltd.;
13. Allianz AG Holding (Germany), ultimate parent of Cornhill Insurance Co., Ltd.;
14. ASEA Brown Boveri (Switzerland), ultimate parent of Sirius Insurance Co., (UK) Ltd.;
15. Willis Corroon PLC, ultimate parent of Sovereign Marine & General Insurance Co.;
16. Tokio Marine & Fire Insurance Co., Ltd. (Japan), ultimate parent of Tokio Marine & Fire Insurance (UK) Ltd.;
17. Mitsui Marine & Fire Insurance Co., Ltd. (Japan), ultimate parent of Taisho Marine & Fire Insurance Co. (UK) Ltd.;
18. UNI Storebrand (Norway), ultimate parent of Storebrand Insurance Co. (UK) Ltd.;
19. Atlantic Mutual Insurance Co. of New York, ultimate parent of Atlantic Mutual Insurance Co.;
20. Allianz AG Holding (Germany), ultimate parent of Allianz International Insurance Co., Ltd.;

LIST OF PARTIES – Continued

21. Employers Insurance of Wausau (U.S.A.), ultimate parent of Wausau Insurance Co. (UK) Ltd.;
22. London & Overseas Insurance Co. PLC, a subsidiary of The Orion Insurance Company, PLC;
23. Contingency Insurance Company, Ltd., a subsidiary of Minster Insurance Co., Ltd.;
24. GAN North America Inc., an associated company of Minster Insurance Co., Ltd.;
25. Prudential Life of Ireland Ltd., a subsidiary of Prudential Assurance Co., Ltd.;
26. Prudential Vita SPA (Italy), a subsidiary of Prudential Assurance Co., Ltd.;
27. Hallmark Insurance Company Ltd., a subsidiary of Pearl Assurance PLC;
28. Leadenhall Insurance Ltd., a subsidiary of Bishopsgate Insurance Ltd.;
29. Hansa General Insurance Co. (UK) Ltd., a subsidiary of Hansa Marine Ins. Co. (UK) Ltd.;
30. Allianz Cornhill Insurance (Far East) Ltd. (Hong Kong), a subsidiary of Cornhill Insurance PLC;
31. Holding Cornhill France SA, a subsidiary of Cornhill Insurance PLC;

LIST OF PARTIES – Continued

32. Cornhill France SA, a subsidiary of Cornhill Insurance PLC;
33. Themis SA (France), a subsidiary of Cornhill Insurance PLC;
34. Sovereign Insurance (UK) Ltd., a subsidiary of Sovereign Marine & General Insurance Co.; and
35. Norden Insurance Co. (UK) Ltd., a subsidiary of Storebrand Insurance Co. (UK) Ltd.

Petitioners' Counsel:

MEYER ORLANDO & EVANS_{PC}
 Michael A. Orlando
 Patrick C. Appel
 Paul LeRoy Crist

Respondents named in the caption of this case were the remaining parties to the proceedings below and so constitute the other individuals and entities that have a direct interest in the judgment sought to be reviewed; Respondents' Counsel below were:

HAYNES & BOONE
 Werner A. Powers
 Charles C. Keeble, Jr.

The parallel litigation subsequently filed by Respondents, *inter alia*, in Texas state court, after amendment, involves the following parties:

LIST OF PARTIES – Continued

1. Sherman Hunt;
2. Stuart Hunt;
3. Hara Hunt;
4. Hilre Hunt;
5. Texana Resources Corporation;
6. Silco, Inc.;
7. Headwater Oil Company;
8. Tribal Drilling Company;
9. Chester J. Donnally, Trustee of the Margaret Hunt Hill – A.G. Hill Trust, the Elisa Margaret Hill Trust, the Heather Victoria Hill Trust, the Cody McArthur Wikert Trust, the Margretta Hill Wikert Trust, the Michael Bush Wisenbaker, Jr. Trust, and the Wesley Hill Wisenbaker Trust;
10. Planet Indemnity Company; and
11. Underwriters Indemnity Company.

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No. _____

In The

Supreme Court of the United States**October Term, 1994**

LESLIE WILTON, ON BEHALF OF HIMSELF AND AS A REPRESENTATIVE OF CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON, AND CERTAIN INSTITUTE OF LONDON UNDERWRITERS COMPANIES, AS FOLLOWS, THE ORION INSURANCE COMPANY, PLC, SKANDIA U.K. INSURANCE PLC, THE YASUDA FIRE & MARINE INSURANCE COMPANY OF EUROPE, LTD., OCEAN MARINE INSURANCE CO., LTD., YORKSHIRE INSURANCE CO., LTD., MINSTER INSURANCE CO., LTD., PRUDENTIAL ASSURANCE CO., LTD., PEARL ASSURANCE PLC, BISHOPSGATE INSURANCE LTD., HANSA MARINE INS. CO. (UK) LTD., VESTA (UK) INS. CO., LTD., NORTHERN ASSURANCE CO., LTD., CORNHILL INSURANCE CO., LTD., SIRIUS INSURANCE CO., (UK) LTD., SOVEREIGN MARINE & GENERAL INSURANCE CO., TOKIO MARINE & FIRE INSURANCE (UK) LTD., TAISHO MARINE & FIRE INSURANCE CO. (UK) LTD., STOREBRAND INSURANCE CO. (UK) LTD., ATLANTIC MUTUAL INSURANCE CO., ALLIANZ INTERNATIONAL INSURANCE CO., LTD., AND WAUSAU INSURANCE CO. (UK) LTD.,

versus

Petitioners,

SEVEN FALLS COMPANY, MARGARET HUNT HILL, ESTATE OF A. G. HILL, LYDA HILL, ALINDA H. WIKERT, AND U.S. FINANCIAL CORP.,

*Respondents.***PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT****PETITION FOR A WRIT OF CERTIORARI**

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United

States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on June 29, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is not reported, and is reprinted in the appendix hereto, pp. A-1 – A-4, *infra*.

The opinion of the District Court for the Southern District of Texas is not reported, and is reprinted in the appendix hereto, pp. B-1 – B-4, *infra*.

JURISDICTION

The decision of the Court of Appeals for the Fifth Circuit was rendered on June 29, 1994. Jurisdiction over this petition is conferred by 28 U.S.C. § 1254.

This case was originally filed in the United States District Court for the Southern District of Texas. Diversity jurisdiction, 28 U.S.C. § 1332, was asserted and relief was sought under the Declaratory Judgment Act, 28 U.S.C. § 2201(a). This case was appealed to the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1291.

STATUTE INVOLVED

28 U.S.C. § 2201(a). Declaratory Judgment Act.

In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT OF THE CASE

This appeal arises out of a dispute between various oil and gas interests, including Seven Falls Company, Margaret Hunt Hill, Estate of A. G. Hill, Lyda Hill, Alinda H. Wikert, and U. S. Financial Corporation ("Respondents"), against their insurers, including Petitioners Leslie Wilton on Behalf of Himself and as Representative of Certain Underwriters at Lloyd's of London, and Certain Member Companies of the Institute of London Underwriters ("Petitioners"), over a \$110 million judgment of the Winkler County, Texas court against Respondents, which they seek covered under Petitioners' policies.¹ Basing jurisdiction upon diversity of citizenship under 28 U.S.C. § 1332, Petitioners filed an action in federal court on December 9, 1992, seeking a declaration that their policies did not cover the losses incurred by Respondents as a result of the Winkler County lawsuits.

¹ See ROA II p. 18 and ROA I p. 262.

After voluntary dismissal and reinstatement of Petitioners' action, Respondents (and others) commenced a parallel state court suit seeking coverage, as well as exemplary and punitive damages, against their insurers.² Based upon this later-filed state court action in a county of clearly improper venue, as Respondents belatedly conceded, the United States District Court for the Southern District of Texas granted Respondents a stay of this declaratory judgement action. Appendix, pp. B-1 – B-4.

Petitioners respectfully assert that for the Declaratory Judgment Act to have any continued validity, the court below had to exercise its jurisdiction over this case and deny the Motion to Dismiss or Stay. Accordingly, the order of the United States District Court for the Southern District of Texas should have been reversed, and affirmation by the Fifth Circuit Court of Appeals suggests certiorari review because it failed even to consider the abstention factors established by *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed. 2d 483 (1976) and *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed. 2d 765 (1983).

BACKGROUND

On July 31, 1992 Petitioners declined to defend Respondents against claims being asserted against them in two nearly identical lawsuits pending in state court in Texas, because the policies in question provided no coverage.³ One of these underlying suits proceeded to trial in September 1992; the other suit was stayed pending outcome of the appeal of the judgment from the trial of the first case.

In November 1992, the jury returned a verdict against Respondents, *inter alia*, in excess of \$110 million on claims of breach of contract, tortious interference with contract, and slander of title. On November 24, 1992, Respondents' counsel advised Petitioners of the adverse jury verdict by a short, one-sentence letter.⁴ No demand for coverage was made at that time and no lawsuit was threatened by the Respondents.

Having declined coverage and believing there to be a serious question as to whether their policies provided coverage, Petitioners filed suit in the United States District Court for the Southern District of Texas on December 9, 1993, seeking a declaration that none of the coverages of the policies insured losses such as incurred as a result of the Winkler County lawsuit.⁵

In December 1992, Respondents' counsel requested that Petitioners dismiss their declaratory judgment action. Respondents' counsel represented to Petitioners' counsel that other insurers were the target of Respondents' coverage

² Cause No. 93-03542, styled *Margaret Hunt Hill, et al. v. Leslie Wilton, et al.*, in the 299th Judicial District Court, Travis County, Texas, has been by agreement of the parties transferred as Cause No. 93-58208, to the 133rd Judicial District Court, Harris County, Texas. This state court action seeks actual damages of \$110 million, plus exemplary and punitive damages of at least \$330 million. ROA II pp. 122-24 ¶¶ 45-51. Also named as defendants were the insurers for the Hunt parties, *i.e.*, Planet Indemnity Company and Underwriters Indemnity Company. ROA II pp. 129 ¶¶ 36-37 & 136.

³ ROA I pp. 185-88, 204 ¶6; III p. 3.

⁴ ROA I pp. 193-95, 205 ¶2; II pp. 53-58, 145-47, 150 ¶2.

⁵ ROA II pp. 1-110; I p. 225; I p. 5.

claims and that no suit against Petitioners was contemplated by Respondents.⁶

Hoping to resolve the coverage dispute amicably without the need of a federal or state court suit, Petitioners agreed voluntarily to dismiss their action. However, Petitioners so agreed only after reaching an agreement that Respondents would give Petitioners two weeks' notice if, and when, Respondents decided to pursue their claims against Petitioners. On January 22, 1993, Petitioners voluntarily dismissed their declaratory judgment action in accordance with this agreement with Respondents.

On February 23, 1993, Respondents' counsel notified Petitioners of their intention to file suit in Travis County, Texas. Accordingly, Petitioners refiled their declaratory judgment action on February 24, 1993.

Although Respondents filed an action at that time against other insurers in state court in Dallas County, Texas,⁷

⁶ ROA I pp. 193-98, 205 ¶3, 225; II pp. 139-144, 150 ¶3; III p. 19. Long before Respondents filed any suit against Petitioners, and indeed before they ever made claims against any of these Underwriters, Respondents were engaged in an active controversy with other insurers.

⁷ *Plaintiffs' Original Petition and Application for Injunctive Relief* was filed by Margaret Hunt Hill, et al., against Ronald Malcolm Pateman, Certain Underwriters at Lloyd's of London and Other Insurance Companies on February 24, 1993, in the 298th Judicial District Court, Dallas County, Texas. ROA I pp. 152-183, 204 ¶7. When Respondents finally brought suit in Dallas County, Texas against their other insurers, it was some three months after the filing of Petitioners' first declaratory judgment action and a month after the voluntary dismissal thereof; as Petitioners were not named as parties in the Dallas

they waited until March 26, 1993 to initiate an action against Petitioners; this was over a month after Petitioners' present declaratory judgment action was filed and almost four months after Petitioners filed their initial declaratory judgment action on December 9, 1992.⁸ Simultaneously, Respondents filed a motion to dismiss or stay this declaratory judgment action pending resolution of their newly instigated state court action.⁹

At the time Petitioners made their Response to the Motion to Dismiss or Stay, the only action taken in the Travis County case had been Respondents' filing of their original petition. At that time, Petitioners had not answered in Travis County nor had even been served with citation therein.¹⁰ Petitioners' answer in the later-filed state court suit was made mere weeks before this action was stayed.¹¹

The district court granted Respondents' motion and ordered this litigation stayed, pending the resolution by the state court of Respondents' later-filed action. The district court based its decision to abstain on two principal factors, namely, the possibility of piecemeal litigation, and Petitioners' "race" to the courthouse, filing suit in anticipation of expected litigation. Appendix pp. B-2 & B-3. In doing so, the district court failed to apply the abstention factors this Court

County action, it took Respondents yet another month to sue Petitioners, when Respondents' Travis County action was filed March 26, 1993.

⁸ ROA II pp. 120-137, 150 ¶5.

⁹ ROA I pp. 261-63.

¹⁰ ROA I pp. 212-13.

¹¹ ROA I p. 213.

mandated in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed. 2d 483 (1976) and *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed. 2d 765 (1983).

On appeal, the Court of Appeals for the Fifth Circuit reviewed the district court's decision solely for abuse of discretion, and affirmed. In doing so, the Fifth Circuit relied upon its decision in *Granite State Ins. Co. v. Tandy Corp.*, 986 F.2d 94, 97 (CA5), cert. granted, ___ U.S. ___, 113 S.Ct. 51, 121 L.Ed. 2d 21 (1992), cert. dismissed, ___ U.S. ___, 113 S.Ct. 1836, 123 L.Ed. 2d 463 (1993), wherein the analysis established under *Colorado River* and *Moses H. Cone* are specifically rejected in the context of the broad discretion to decline to grant declaratory relief under *Brillhart v. Excess Insurance Co.*, 316 U.S. 491, 62 S.Ct. 1173, 86 L.Ed. 2d 1620 (1942). Appendix, pp. A-3 & A-4. As interpreted by the Court of Appeals, the exceptional-circumstances test required by this Court in all other abstention-type cases is unnecessary in decisions under the Declaratory Judgment Act. The Fifth Circuit deviated from established practice in at least six other circuits in its deference to the district court's discretion, and from the law applied in at least ten other circuits in its outright rejection of *Colorado River* and *Moses H. Cone*. In direct conflict with current Fifth Circuit practice, four circuits have expressly mandated that a district court *must* consider the *Colorado River/Moses H. Cone* factors before deciding to abstain from exercising its jurisdiction in a declaratory judgment action.

REASONS FOR GRANTING THE WRIT

I. In conflict with other Circuits, the Fifth Circuit reviews a district court's decision to stay under a deferential abuse of discretion standard rather than *de novo*.

The Fifth Circuit, in the opinion below, held that, "This court reviews the dismissal of a declaratory judgment action for an abuse of discretion." Appendix, p. A-3. As read by the Court of Appeals, this discretion vested in the district court is reviewed highly deferentially under several cases. *Brillhart*, 316 U.S. at 497; *Travelers Ins. Co. v. Louisiana Farm Bureau Federation, Inc.*, 996 F.2d 774, 778-79 (CA5 1993); *Granite State*, 986 F.2d at 97-98; *Rowan Co., Inc. v. Griffin*, 876 F.2d 26, 29 (CA5 1989). In doing so, the Fifth Circuit is in accord with the First and the Second Circuits and the recent decisions of the Eighth and the Tenth Circuits in *United States Fidelity & Guar. Co. v. Murphy Oil USA, Inc.*, 21 F.3d 259, 263 (CA8 1994) and *State Farm Fire & Cas. Co. v. Mhoon*, ___ F.3d ___, 1994 WL 396173 (CA10 August 1, 1994).¹²

This deferential review directly conflicts with decisions of the Third, the Sixth, the Seventh, the Ninth, the Eleventh and the District of Columbia Circuits. *See Continental Cas. Co. v. Robsac Indus.*, 947 F.2d 1367, 1370 (CA9 1991) (insurance dispute); *Allstate Ins. Co. v. Mercier*, 913 F.2d 273, 277 (CA6 1990) (insurance dispute); *Cincinnati*

¹² See *El Dia, Inc. v. Hernandez Colon*, 963 F.2d 488, 490 (CA1 1992); *Villa Marina Yacht Sales v. Hatteras Yachts*, 915 F.2d 7, 16 (CA1 1990); *General Reinsurance Corp. v. Ciba-Geigy Corp.*, 853 F.2d 78, 81 (CA2), cert. denied, ___ U.S. ___, 114 S.Ct. 1126, 127 L.Ed. 2d 434 (1988).

Ins. Co. v. Holbrook, 867 F.2d 1330, 1333 (CA11 1989) (insurance dispute); *International Harvester Co. v. Deere & Co.*, 623 F.2d 1207, 1217 (CA7 1980) (patent dispute); *Hanes Corp. v. Millard*, 531 F.2d 585, 591 (CADC 1976) (personal injury action). Review by this Court is necessary to provide a consistent standard among the Circuits concerning exercise of federal jurisdiction.

Decisions in the other Circuits highlight the importance of this issue. "Because theories of state and federal law, and expressions of federalism and comity, are so interrelated in the decision to abstain such dispositions are elevated to a level of importance dictating *de novo* appellate review." *Traughber v. Beauchane*, 760 F.2d 673, 676 (CA6 1985) (Pullman abstention). Specifically, the Sixth Circuit reviews *de novo* decisions involving the exercise of discretion under the declaratory judgment act. *Mercier*, 913 F.2d at 277 (construction of a homeowners insurance policy); *see also Heitmanis v. Austin*, 899 F.2d 521, 527 (CA6 1990) (Colorado River abstention).

When the Pennsylvania Insurance Commissioner sued foreign reinsurers on behalf of a regulated carrier in receivership, the reinsurers counterclaimed for a declaration of rights in *Grode v. Mutual Fire, Marine & Inland Ins. Co.*, 8 F.3d 953, 957-58 (CA3 1993). Upon review claiming abuse of discretion in abstaining under either the Colorado River or Burford doctrines, the Third Circuit clarified that "the underlying legal questions are subject to plenary review," so that the appeals court's review is not limited to an abuse-of-discretion standard. *Grode*, 8 F.3d at 957.

The Ninth and the Eleventh Circuits also review *de novo* the decision to exercise jurisdiction over insurance

disputes under the Declaratory Judgment Act. *40235 Washington Street Corp. v. Lusardi*, 976 F.2d 587, 588-89 (CA9 1992); *Robsac*, 947 F.2d at 1370. The Eleventh Circuit has specifically rejected deferential review in a declaratory judgment action, and uses its own judgment to resolve the issues.¹³ "Although the district court has an area of discretion in deciding whether to grant or deny declaratory relief, that discretion should be exercised liberally in favor of granting such relief in order to accomplish the purposes of the Declaratory Judgment Act. The scope of appellate review of the exercise of such discretion is not under an 'arbitrary and capricious' standard but allows the appellate court to substitute its judgment for that of the trial court." *Cincinnati Insurance*, 867 F.2d at 1333 (citations omitted).

The importance of this issue is not limited to the insurance context. And while the Federal Circuit and scattered patent decisions from the other courts of appeals utilize an abuse of discretion standard,¹⁴ the Seventh and the District of Columbia Circuits have reviewed declaratory judgment abstentions *de novo* in that and other contexts. Though there is "no absolute right to a

¹³ *Turner Entert. Co. v. Degeto Film Gmbh.*, 25 F.3d 1512, 1515 (CA11 1994); *American Mfrs. Mut. Ins. Inc. v. Edward D. Stone, Jr. & Assoc.*, 743 F.2d 1519, 1525 (CA11 1984).

¹⁴ *Gerentech, Inc. v. Eli Lilly & Co.*, 998 F.2d 931, 933 (CTAF 1993) (abuse of discretion to dismiss University "in favor of later-filed suit in California"); *Intermedics Infusaid, Inc. v. Regents of Univ. of Minn.*, 804 F.2d 129, 133 (CTAF 1986) (no abuse of discretion to stay a patent declaratory judgment action brought by the licensee).

declaratory judgment in the federal courts," in the District of Columbia Circuit, the grant or denial of declaratory relief is subject to "searching review." *Hanes Corp.*, 531 F.2d at 591. The Seventh Circuit "does not defer to the judgment of the district court [but] must exercise its own sound discretion as to the propriety of the grant or denial of a declaratory judgment." *International Harvester*, 623 F.2d at 1217 (citations omitted) (patent violation); *see also Tempco Elec. Heater Co. v. Omega Engineering, Inc.*, 819 F.2d 746, 749 (CA7 1987) (patent infringement).

The Third, the Sixth, the Seventh, the Ninth, the Eleventh and the District of Columbia Circuits review *de novo* abstention decisions in declaratory judgment cases. The deferential review accorded by the First, the Second, the Fifth, the Eighth, and the Tenth (and to a limited extent the Fourth and the Federal) Circuits is in express conflict with the decisions of six other Circuits. The substantial conflict between the standards applied between the two circuit groupings indicates that this problem extends beyond the particular facts of Petitioners' dispute with their insureds. The breadth of the conflict, and the need to assure uniformity among the Circuits on a basic issue of federal procedure, support the granting of the writ Petitioners' request.

II. In conflict with decisions of other Circuits, the Fifth Circuit has expressly ignored this Court's mandate that federal courts have a virtually unflagging obligation to exercise their jurisdiction, and that only exceptional circumstances justify abdication of that responsibility.

This Court should hear this case to restore the efficacy of the declaratory judgment remedy and to resolve the conflicting decisions involving the abstention doctrine as applied in the declaratory judgment context. This case presents the Court with a prime opportunity to resolve conclusively what has become an increasingly tangled web of decisions issued by several courts of appeals on the factors appropriate for determining whether a district court should abstain from exercising jurisdiction in a declaratory judgment action.

A. Policy considerations, issues of federalism and comity, and effectuation of Congress' intent support certiorari review of this case.

Deference to a later-filed state court action, simply because another forum is available, is inconsistent with the affirmative, remedial character of the right to a federal forum granted by Congress. The legislative intent is clear that parties to private disputes should be able to avail themselves of this procedural mechanism and obtain, where appropriate, a declaration of their rights and responsibilities from a neutral forum. H.R. Rep. No. 627, 72d Cong., 1st Sess., at 2 (1932); H.R. Rep. No. 1264, 73d Cong., 2d Sess., at 2 (1934).

Congress has not given district courts discretion to dismiss cases merely because it is more convenient to do so. Rather, district courts have discretion to grant the relief sought, or to deny the relief sought, following a full trial on the merits. *See S. Rep. No. 1005, 73d Cong., 2d Sess.*, at 2, 5 (1934). As visualized by its framers, the Declaratory Judgment Act was intended to be a progressive, affirmative protection for "the perplexed and insecure citizen," specifically in insurance disputes. *Edwin Borchard, DECLARATORY JUDGMENTS* vii, 634-80 (2d ed. 1941).¹⁵

All litigants have a right to maintain a suit under the Declaratory Judgment Act to secure a judgment determining the obligations and liabilities of the parties. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 243-44, 57 S.Ct. 461, 465, 81 L.Ed. 617, 622-23 (1937). To effectuate this intent, district courts must give declaratory judgment litigants their day in court. District courts *must* hear declaratory judgment cases; district courts *may* decline to enter the requested relief. *See H.R. Rep. No. 627, 72d Cong., 1st Sess.*, at 2 (1932).

The Fifth Circuit's decision to allow unfettered discretion to stay duly-filed federal cases in light of later-filed state actions effectively eviscerates the declaratory judgment remedy that Congress enacted for situations just like the one in this case. This Court's recent decisions in *McCarthy v. Madigan*, ___ U.S. ___, 112 S.Ct. 1081, 117

¹⁵ Professor Borchard, one of the earliest proponents of declaratory judgments, testified before the Senate Judiciary Committee in support of the passage of the Declaratory Judgment Act. *See S. Rep. No. 1005, 73d Cong., 2d Sess.*, at 2 (1934).

L.Ed. 2d 291 (1992), and *New Orleans Pub. Serv., Inc. v. New Orleans*, 491 U.S. 350, 109 S.Ct. 2506, 105 L.Ed. 2d 298 (1989), command a district court with valid jurisdiction to exercise that jurisdiction in declaratory judgment cases, except in the most exceptional circumstances.

McCarthy, New Orleans Pub. Serv., Inc., and Moses H. Cone make it clear that declaratory judgment actions must be viewed with the same unflagging obligation to exercise jurisdiction as is required with all other types of actions validly within federal jurisdiction. If the only restraints on a district court's discretion is that its decision to stay or dismiss a declaratory judgment action is not governed by bias and is neither arbitrary nor capricious, the mere pendency of a state court action will be considered sufficient grounds to abstain.¹⁶ District courts may not cavalierly cast aside their responsibility to resolve matters within their jurisdiction, and "there is no doctrine that the availability or even the pendency of state judicial proceedings excludes the federal courts." *New Orleans Pub. Serv., Inc.*, 491 U.S. at 373, 109 S.Ct. at 2520.

¹⁶ Some lower federal courts, presented with declaratory judgment actions and parallel state court litigation, have applied *Colorado River* where federal law is at issue, but not when state law applies. Still others have applied *Colorado River* when the federal court action was filed first, but not when it was filed later. Where circuit law so required or the conscience of the court indicated its propriety, some district courts have paid lip service to the factors this Court has articulated, but in practice have simply ignored *Colorado River's* unflagging obligation to exercise jurisdiction.

As federal jurisdiction is not discretionary, the absence of a test restraining the district courts' unfettered discretion to decline that jurisdiction is "treason to the Constitution." *Id.* at 358, 109 S.Ct. at 2512-13 ("The right of a party plaintiff to choose a federal court where there is a choice cannot properly be denied." (citations omitted)).

Absent some uniform set of factors to govern the discretion *Brillhart* and its Fifth and Ninth Circuit progeny vest with the district courts, there is serious doubt as to the continuing viability of the Declaratory Judgment Act as an affirmative remedy, especially for insurers. Coupled with the Fifth Circuit's abuse-of-discretion review of the decision to dismiss or stay, unfettered discretion seriously prejudices a declaratory judgment plaintiff's right to request a statutory remedy under standardized considerations "informed by the teachings and experience concerning the functions and extent of federal judicial power." *Public Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 243, 73 S.Ct. 236, 240, 97 L.Ed. 291, 299 (1952). The importance of both federalism and comity concerns require that district courts faced with declaratory judgment actions engage in a careful analysis of the factors set out by this Court in *Colorado River* and *Moses H. Cone*.

B. The Fifth, the Seventh, and the Ninth Circuits have given district courts virtually unfettered discretion to dismiss or stay validly filed declaratory judgment actions, whereas adherence to this Court's commands regarding abstention substantially protects litigants in the other ten circuits in their exercise of the federal remedy Congress saw fit to create.

Resolution by this Court is also required by the direct conflict amongst the Circuits, and in some instances within decisions of a circuit distinguishable only by judicial fictions tailored to the facts.¹⁷ The Fifth Circuit has ultimately held that, in declaratory judgment cases, a district court has virtually unfettered discretion guided by only the roughest considerations.¹⁸ In accord with the Ninth Circuit in *RobSac*, the Fifth Circuit in *Granite State* and subsequent decisions has held that the *Colorado River*

¹⁷ Compare *Sinclair Oil Corp. v. Amoco Production Co.*, 982 F.2d 437, 440 (CA10 1992) with *Life-Link Intern., Inc. v. Lalla*, 902 F.2d 1493, 1495 (CA10 1990); and *Aetna Cas. & Sur. Co. v. Merritt*, 974 F.2d 1196, 1199 (CA9 1992) with *Continental Cas. Co. v. RobSac Indus., Inc.*, 947 F.2d 1367, 1371 (CA9 1991); and *Rowan Co., Inc. v. Griffin*, 876 F.2d 26, 29 (CA5 1989) with *Evanston Ins. Co. v. Jimco, Inc.*, 844 F.2d 1185, 1191 (CA5 1988).

¹⁸ While there is now a six-factor Fifth Circuit test for abstention from a declaratory judgment action in consideration of a parallel state court suit, a district court's decision to dismiss or stay a properly filed federal action still does not have to weigh three of the crucial considerations articulated in *Colorado River*, 424 U.S. at 800 and *Moses H. Cone*, 460 U.S. at 1. See *Travelers*, 996 F.2d at 778-79 (omitting jurisdiction over real property, precedence of filing, conflict of laws or application of federal law).

and *Moses H. Cone* factors do not apply to declaratory judgment actions. *Travelers*, 996 F.2d at 778-79. *Accord Robsac*, 947 F.2d at 1370. Petitioners respectfully assert that this is contrary to this Court's pronouncement that "Abdication of the obligation to decide cases can be justified under [the abstention] doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest." *Colorado River*, 424 U.S. at 813.

When *Granite State* overruled a conflicting intracircuit decision that had applied the *Colorado River/Moses H. Cone* factors, the Fifth Circuit joined a very small minority. While four of the courts of appeals have expressly mandated that district courts consider the *Colorado River/Moses H. Cone* factors in all declaratory judgment cases,¹⁹ another six circuits have ruled that this Court's traditional abstention analysis governs at least some declaratory judgment contexts or that some elements of this Court's test should be considered in deciding to dismiss or stay a properly filed declaratory judgment action.

Only two courts of appeals, those for the Seventh and the Ninth Circuits, have never held that traditional abstention analysis and specifically the *Colorado*

¹⁹ *Employers Ins. of Wausau v. Missouri Elec. Works, Inc.*, 23 F.3d 1372, 1374-75 (CA8 1994); *Villa Marina Yacht Sales v. Hatteras Yachts*, 915 F.2d 7, 16 (CA1 1990); *General Reinsurance Corp. v. Ciba-Geigy Corp.*, 853 F.2d 78, 81 (CA2 1988); *American Mfrs. Mut. Ins. Inc. v. Edward D. Stone, Jr. & Assoc.*, 743 F.2d 1519, 1525 (CA11 1984).

River/Moses H. Cone factors apply to declaratory judgment actions.²⁰ In comparison, the First Circuit in *Villa Marina* not only held the six factors applied in *Moses H. Cone* directly applicable to declaratory judgment cases, but offered – factor by factor for three pages – the district court on remand "some guidance for what we anticipate will be a difficult decision [because it is] worth giving some attention to our view of the significance of certain factors." *Villa Marina*, 915 F.2d at 13 & 14-16.

In addition to the First, the Second, the Eighth, and the Eleventh Circuits wherein the *Colorado River/Moses H. Cone* factors expressly govern declaratory judgment abstention and effectively limit the district court's unbridled discretion under *Brillhart*, those factors have been applied sporadically or were at least considered in cases from six other circuits. *Gerentech, Inc. v. Eli Lilly & Co.*, 998 F.2d 931, 949 (CA7 1993); *Mitcheson v. Harris*, 935 F.2d 235, 239-40 & n.2 (CA4 1992); *University of Maryland*

²⁰ *Robsac*, 947 F.2d at 1370. But see *Allendale Mut. Ins. Co. v. Bull Data Sys.*, 10 F.3d 425, 430-31 (CA7 1993) (after *New Orleans Pub. Serv. Inc.*, applies *Colorado River* presumption against abstention in a declaratory judgment context, but no discussion of the six-factor test); *Interstate Material Corp. v. City of Chicago*, 847 F.2d 1285, 1288 (CA7 1988) (ten-factor test arguably incorporating all this Court's considerations, but in different formulations); *Tempco Elec. Heater Co. v. Omega Engineering, Inc.*, 819 F.2d 746, 749 (CA7 1987) (upholds *Brillhart* discretion in patent infringement case, but declines to address declaratory judgment plaintiff's invocation of abstention principles); *Board of Educ. v. Bosworth*, 713 F.2d 1316, 1318 (CA7 1983) (*Burford* abstention). The discernable trend in the Seventh Circuit is, if predictions were to be made, to adopt this Court's *Colorado River/Moses H. Cone* factors, as well as the presumption against abstention and the exceptional-circumstances doctrine.

v. Peat Marwick Main & Co., 923 F.2d 265, 271 (CA3 1991); *Life-Link Intern., Inc. v. Lalla*, 902 F.2d 1493, 1495 (CA10 1990); *Heitmanis v. Austin*, 899 F.2d 521, 527 (CA6 1990); *Hanes Corp. v. Millard*, 531 F.2d 585, 591 (CA DC 1976).

While there is either conflicting authority within the circuit or there are differing tests depending upon circumstances the court of appeals has considered determinative of a particular case,²¹ the District of Columbia, the Federal, the Third, the Fourth, the Sixth, and the Tenth Circuits join the First, the Second, the Eighth, and the Eleventh Circuits in considering this Court's abstention precedents at least applicable to the decision to stay or dismiss a properly filed declaratory judgment action.

This case is stayed because of the Fifth Circuit's use of a scheme contrary to the decisions of its sister circuits and this Court. Had this case been brought in a district court in the District of Columbia, the Federal, the First, the Second, the Third, the Fourth, the Sixth, the Eighth, the Tenth or the Eleventh Circuits, those courts would have allowed this case to proceed. The circuit in which a case is filed should not determine the standard applied in exercising federal jurisdiction. Certiorari is warranted to

²¹ For instance, the District of Columbia Circuit has had few occasions to pass on the factors to be considered in declining to hear a declaratory judgment action, but *Hanes Corp.* does cite to *Colorado River*. *Hanes Corp.*, 531 F.2d at 591. The Tenth Circuit has the most tangled set of tests and the clearest intracircuit split. See, e.g., *Sinclair Oil Corp. v. Amoco Production Co.*, 982 F.2d 437, 440 (CA10 1992) (in conflict with *Life-Link Intern., Inc. v. Lalla*, 902 F.2d 1493, 1495 (CA10 1990)).

resolve this conflict between two groups of circuits, and to assure uniformity of federal decisions on this issue of federal law.

This significant split between the Circuits as to the proper analysis to be applied in declaratory judgment actions requires immediate resolution. While certiorari review by this Court on this particular issue was granted in *Granite State*, voluntary dismissal of that cause left practitioners and the Courts of Appeals without guidance. *Cert. granted* ___ U.S. ___, 113 S.Ct. 51, 121 L.Ed. 2d 21 (1992); *cert. dismissed*, ___ U.S. ___, 113 S.Ct. 1836, 123 L.Ed. 2d 463 (1993).

The Fifth Circuit is the only court of appeals which has expressly declared that the standardless decision to dismiss or stay will be reviewed only for an abuse of discretion by the district court. In contrast with even the Ninth Circuit that also rejects the applicability of *Colorado River* and *Moses H. Cone* to declaratory judgment actions, the Fifth Circuit has left litigants with no meaningful protection against the "whim or personal disinclination" of the district courts to decline properly invoked jurisdiction whenever a parallel suit suggests the possibility of piecemeal litigation. Substantially standardless and nearly unreviewable discretion to dismiss or stay mocks the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River*, 424 U.S. at 817; 96 S.Ct. at 1246.

CONCLUSION

This case involves the degree of deference a district court's decision to dismiss or stay a declaratory judgment action deserves on appeal, and the factors which should be applied in that decision regardless of the circuit in which the federal action is filed. The importance of these issues extends well beyond the facts of this dispute, for the outcome here will affect the abstention doctrine broadly. Nothing less than the continued viability of the Declaratory Judgment Act is at stake. For these reasons, the Court should exercise its discretion to grant a writ of certiorari.

Respectfully submitted,

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 Lloyd's of London, and Certain
 Member Companies of the
 Institute of London Underwriters

September 26, 1994

No. _____

In The
Supreme Court of the United States
 October Term, 1994

LESLIE WILTON, ON BEHALF OF HIMSELF AND AS A
 REPRESENTATIVE OF CERTAIN UNDERWRITERS AT
 LLOYD'S OF LONDON, AND CERTAIN INSTITUTE OF
 LONDON UNDERWRITERS COMPANIES, AS FOLLOWS, THE
 ORION INSURANCE COMPANY, PLC, SKANDIA U.K.
 INSURANCE PLC, THE YASUDA FIRE & MARINE
 INSURANCE COMPANY OF EUROPE, LTD., OCEAN
 MARINE INSURANCE CO., LTD., YORKSHIRE INSURANCE
 CO., LTD., MINSTER INSURANCE CO., LTD., PRUDENTIAL
 ASSURANCE CO., LTD., PEARL ASSURANCE PLC,
 BISHOPSGATE INSURANCE LTD., HANSA MARINE INS. CO.
 (UK) LTD., VESTA (UK) INS. CO., LTD., NORTHERN
 ASSURANCE CO., LTD., CORNHILL INSURANCE CO., LTD.,
 SIRIUS INSURANCE CO., (UK) LTD., SOVEREIGN MARINE &
 GENERAL INSURANCE CO., TOKIO MARINE & FIRE
 INSURANCE (UK) LTD., TAISHO MARINE & FIRE
 INSURANCE CO. (UK) LTD., STOREBRAND INSURANCE CO.
 (UK) LTD., ATLANTIC MUTUAL INSURANCE CO., ALLIANZ
 INTERNATIONAL INSURANCE CO., LTD., AND WAUSAU
 INSURANCE CO. (UK) LTD.,

versus *Petitioners*,

SEVEN FALLS COMPANY, MARGARET HUNT HILL,
 ESTATE OF A. G. HILL, LYDA HILL, ALINDA H. WIKERT,
 AND U.S. FINANCIAL CORP.,

Respondents.

**APPENDIX TO
 PETITION FOR WRIT OF CERTIORARI
 TO THE UNITED STATES COURT OF APPEALS
 FOR THE FIFTH CIRCUIT**

APPENDIX
UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-2608
Summary Calendar

LESLIE WILTON, ETC., ET AL.,
Plaintiffs-Appellants,
VERSUS
SEVEN FALLS COMPANY, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA H 93 0531)

[Filed June 29, 1994]

Before GARWOOD, DAVIS, and DUHÉ, Circuit Judges.

DAVIS, Circuit Judge:¹

The plaintiffs appeal the district court's order staying this action for declaratory judgment pending resolution of a later-filed state court suit. Because we find that the

¹ Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

district court did not abuse its discretion in staying this action, we affirm.

I.

In October 1992, a verdict in excess of \$100 million was rendered against the appellees and others in suits involving a dispute over the ownership and operation of certain oil and gas properties. Anticipating litigation based on this verdict, in December 1992, the plaintiffs/appellants (collectively "London Underwriters") filed a declaratory judgment action pursuant to 28 U.S.C. § 2201 in the United States District Court for the Southern District of Texas. The appellants sought declaration of their rights and liabilities under several policies of commercial general liability insurance issued to appellees (collectively the "Hill Group"). Counsel for the parties thereafter entered into an agreement whereby London Underwriters agreed to voluntarily dismiss their declaratory judgment action in exchange for the Hill Group's agreement to provide London Underwriters two weeks advance notice prior to commencing any litigation against London Underwriters.

In February 1993, the Hill Group notified London Underwriters of their intention to file suit in state court. London Underwriters immediately filed this declaratory judgment action in the Southern District of Texas. In March 1993, the Hill Group filed an action against London Underwriters in state court. At approximately the same time, the Hill Group also filed a Rule 12(b) motion to dismiss or stay the federal declaratory judgment action. The district court granted the appellees's [sic] Rule

12 motion, staying the declaratory judgment action pending resolution of the state court action. London Underwriters appeal.

II.

The district court has broad discretion to grant (or decline to grant) declaratory judgment. **Torch, Inc. v. LeBlanc**, 947 F.2d 193, 194 (5th Cir. 1991). This court reviews the dismissal of a declaratory judgment action for an abuse of discretion. **Rowan Cos. v. Griffin**, 876 F.2d 26, 29 (5th Cir. 1989).

The district court may consider a variety of factors in considering whether to grant or deny declaratory relief, including the existence of a pending state court proceeding in which the issues might be fully litigated. **Id.**

Fundamentally, the district court should determine whether the state action provides an adequate vehicle for adjudicating the claims of the parties and whether the federal action serves some purpose beyond mere duplication of effort. The district court should consider denying declaratory relief to avoid gratuitous interference with the orderly and comprehensive disposition of a state court litigation if the claims of all parties can satisfactorily be adjudicated in the state court proceeding.

Matter of Magnolia Marine Transp. Co., 964 F.2d 1571, 1581 (5th Cir. 1992) (internal punctuation and citations omitted).

The pending state court action in this case encompasses the coverage issues raised by London Underwriters in this declaratory action. The appellants are parties to the pending state court action and may assert coverage defenses in that suit. The district court did not abuse its discretion in concluding that maintenance of this declaratory judgment action would result in piecemeal adjudication of the coverage dispute and would reward London Underwriters's [sic] attempts to forum shop. Accordingly, the district court's order declining to entertain this declaratory judgment action is affirmed.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LESLIE WILTON, On Behalf	§	CIVIL ACTION NO. H-93-531
of Himself and as a	§	
Representative of Certain	§	
Underwriters at Lloyd's of	§	
London, et al.,	§	
Plaintiffs,	§	
v.	§	
SEVEN FALLS COMPANY, et al.,	§	
Defendants.	§	

O R D E R

[Filed July 2, 1993]

Pending before this Court is a motion to dismiss or to stay (Document #3) filed by defendants Seven Falls Company, Margaret Hunt Hill, Estate of A.G. Hill, Lyda Hill, Alinda H. Wikert, and U.S. Financial Corporation. After having considered the motion, the submissions of the parties, and the applicable law, the Court determines that this action should be stayed.

Plaintiffs Leslie Wilton, on behalf of himself and as a representative of certain Underwriters at Lloyd's of London, and certain Institute of London Underwriters companies filed this action, seeking a declaration of their rights and obligations under five different insurance policies issued to the defendants. *See Document #1.* Plaintiffs have denied coverage and defense obligations under the policies for claims pending against defendants in Winkler

County, Texas and Dallas County, Texas (collectively, the "Heritage Group claims"). See Document #1, Exhibit C.

In September 1992, before this action was filed, the lawsuit pending in Winkler County proceeded to trial, and the court entered a jury verdict against the defendants in excess of \$100 million. Document #3 at 1-2. After receiving notice of the verdict, plaintiffs filed a declaratory judgment suit identical to the present action on December 9, 1992. Document #3 at 2; Document #5 at 2-3. That suit was dismissed without prejudice pursuant to an agreement of counsel which required defendants to give plaintiffs notice of any intent to commence litigation in the future. Document #3 at 2; Document #5 at 3. Such notice was given on February 23, 1993, and plaintiffs filed this action later that day. *Id.* On March 26, 1993, defendants filed a suit in Travis County, Texas, against the plaintiffs for, among other things, breach of contract and breach of the duty of good faith and fair dealing. *Id.* In the instant motion, defendants seek to dismiss or to stay this action pending the conclusion of the related suit in Travis County.

The district court, in its discretion, may provide declaratory relief. *909 Corp. v. Village of Bolingbrook Police Pension Fund*, 741 F. Supp. 1290, 1292 (S.D. Tex. 1990) (citing *Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599, 601 (5th Cir. 1983)). To determine if declaratory relief is appropriate, the court may consider whether the declaratory judgment action was filed in anticipation of a trial on the same issues in state court. *Rowan Companies, Inc. v. Griffin*, 876 F.2d 26, 29 (5th Cir. 1989) (citing *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491, 494-5 (1942)); *909 Corp.*, 741 F. Supp. at 1292. The court may also

consider whether granting relief will result in piecemeal litigation. *Granite State Ins. Co. v. Tandy Corp.*, 762 F. Supp. 156, 157 (S.D. Tex. 1991), *aff'd*, 959 F.2d 968 (1992) (citations omitted).

The state court lawsuit pending in Travis County encompasses the coverage issues raised by the plaintiffs in this action. The plaintiffs are already parties to that suit and may assert their claims as defenses or counter-claims. Resolving the plaintiffs' claims in this Court, however, would not dispose of the Travis County suit. Further, when the plaintiffs originally filed this suit in December 1992, they did so in anticipation of litigation after receiving notice of the Winkler County verdict. *See 909 Corp.*, 741 F. Supp. at 1292-93 (disallowing forum shopping in the guise of a declaratory judgment action). Thus, the Court finds that exercising jurisdiction to grant declaratory relief would result in the piecemeal adjudication of the plaintiffs' and defendants' coverage dispute and would reward plaintiffs' attempts to forum shop. *See Document #4, Exhibits B, C.* A stay of these proceedings is therefore appropriate.

Based on the foregoing, the Court

ORDERS that defendants' motion to dismiss or to stay (Document #3) is GRANTED IN PART. This action [is] hereby STAYED pending resolution of *Margaret Hunt Hill, et al. v. Leslie Wilton, et al.*, No. 93-03542, currently pending in the 299th Judicial District Court of Travis County, Texas.

SIGNED at Houston, Texas, on this the 30 day of
June, 1993.

/s/ **David Hittner**
DAVID HITTNER
United States
District Judge

In The
Supreme Court of the United States
 October Term, 1994

OCT 28 1994

OFFICE OF THE CLERK

LESLIE WILTON, ON BEHALF OF HIMSELF AND AS A
 REPRESENTATIVE OF CERTAIN UNDERWRITERS AT
 LLOYD'S OF LONDON, AND CERTAIN INSTITUTE OF
 LONDON UNDERWRITERS COMPANIES, AS FOLLOWS,
 THE ORION INSURANCE COMPANY, PLC, SKANDIA U.K.
 INSURANCE PLC, THE YASUDA FIRE & MARINE
 INSURANCE COMPANY OF EUROPE, LTD., OCEAN
 MARINE INSURANCE CO., LTD., YORKSHIRE
 INSURANCE CO., LTD., MINSTER INSURANCE CO., LTD.,
 PRUDENTIAL ASSURANCE CO., LTD., PEARL
 ASSURANCE PLC, BISHOPSGATE INSURANCE LTD.,
 HANSA MARINE INS. CO. (UK) LTD., VESTA (UK) INS.
 CO., LTD., NORTHERN ASSURANCE CO., LTD.,
 CORNHILL INSURANCE CO., LTD., SIRIUS INSURANCE
 CO., (UK) LTD., SOVEREIGN MARINE & GENERAL
 INSURANCE CO., TOKIO MARINE & FIRE INSURANCE
 (UK) LTD., TAISHO MARINE & FIRE INSURANCE CO.
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 ATLANTIC MUTUAL INSURANCE CO., ALLIANZ
 INTERNATIONAL INSURANCE CO., LTD., AND
 WAUSAU INSURANCE CO. (UK) LTD.,

Petitioners,

v.

SEVEN FALLS COMPANY, MARGARET HUNT HILL,
 ESTATE OF A.G. HILL, LYDA HILL, ALINDA H.
 WIKERT, AND U.S. FINANCIAL CORP.,

Respondents.

**On Petition For A Writ Of Certiorari To The
 United States Court Of Appeals For The Fifth Circuit**

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

- I. Does the "exceptional circumstances" test apply to a federal district court's determination of whether to abstain from exercising its jurisdiction in a declaratory judgment action?
- II. Even if the "exceptional circumstances" test applies, was the district court's stay order proper?
- III. Under either a *de novo* or an abuse of discretion standard, was the district court's stay order proper?

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No. 94-562

In The

Supreme Court of the United States

October Term, 1994

LESLIE WILTON, ON BEHALF OF HIMSELF AND AS A REPRESENTATIVE OF CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON, AND CERTAIN INSTITUTE OF LONDON UNDERWRITERS COMPANIES, AS FOLLOWS, THE ORION INSURANCE COMPANY, PLC, SKANDIA U.K. INSURANCE PLC, THE YASUDA FIRE & MARINE INSURANCE COMPANY OF EUROPE, LTD., OCEAN MARINE INSURANCE CO., LTD., YORKSHIRE INSURANCE CO., LTD., MINSTER INSURANCE CO., LTD., PRUDENTIAL ASSURANCE CO., LTD., PEARL ASSURANCE PLC, BISHOPSGATE INSURANCE LTD., HANSA MARINE INS. CO. (UK) LTD., VESTA (UK) INS. CO., LTD., NORTHERN ASSURANCE CO., LTD., CORNHILL INSURANCE CO., LTD., SIRIUS INSURANCE CO., (UK) LTD., SOVEREIGN MARINE & GENERAL INSURANCE CO., TOKIO MARINE & FIRE INSURANCE (UK) LTD., TAISHO MARINE & FIRE INSURANCE CO. (UK) LTD., STOREBRAND INSURANCE CO. (UK) LTD., ATLANTIC MUTUAL INSURANCE CO., ALLIANZ INTERNATIONAL INSURANCE CO., LTD., AND WAUSAU INSURANCE CO. (UK) LTD.,

Petitioners,

v.

SEVEN FALLS COMPANY, MARGARET HUNT HILL, ESTATE OF A.G. HILL, LYDA HILL, ALINDA H. WIKERT, AND U.S. FINANCIAL CORP.,

Respondents.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny Petitioners' request for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 29, 1994.

STATEMENT OF THE CASE

Petitioners' statement of the case is misleading. For this reason, Respondents submit the following.

This is an insurance coverage dispute arising out of three underlying lawsuits, two of which were consolidated in the district court of Winkler County, Texas. The third lawsuit is pending in a district court in Dallas County, Texas. (R II p. 119.) Each of the underlying lawsuits involves a dispute over the ownership and/or operation of certain oil and gas properties located in Winkler County, Texas. (R III p. 3.) In late September, 1992, the consolidated Winkler County suits proceeded to trial. After a three week trial, a verdict in excess of \$100 million was rendered against the Respondents and others. (R II pp. 118-19.)

Petitioners were given notice of this verdict by counsel for Respondents in November, 1992. (R II pp. 145-47, 150 at ¶ 2.) On December 9, 1993, before judgment was even rendered on the Winkler County verdict and despite the fact that Petitioners had previously denied coverage to Respondents for the Winkler County litigation, Petitioners, anticipating litigation from Respondents and desiring to shop for the most advantageous forum, instituted Civil Action No. H-92-3749, a suit identical to this

one, in the United States District Court for the Southern District of Texas. (R I pp. 261-63; R II p. 118.) That suit was dismissed without prejudice pursuant to an agreement of counsel. (R II pp. 118, 139-44, 150 at ¶ 3.)

Counsel for Respondents obtained Petitioners' agreement to dismiss their original declaratory judgment action in order to avoid the possibility that the mere existence of Petitioners' declaratory judgment action might jeopardize ongoing negotiations between Respondents and certain of their other insurers regarding the underlying Winkler County litigation.¹ (R III pp. 3-4.) In exchange for procuring Petitioners' voluntary dismissal of their original declaratory judgment action, Respondents agreed to give Petitioners fourteen days advance notice prior to instituting litigation against Petitioners in order that Petitioners might retain their perceived advantage in having the first suit on file. (R II p. 141 ¶ 1.)

On February 12, 1993, the Winkler County District Court entered a judgment on the jury's verdict. Shortly thereafter, on February 17, 1993, Petitioners' other insurers instituted a declaratory judgment action against

¹ Respondents maintained insurance coverage with these other insurers in the amount of at least \$100 million. (R III p. 3.) The insurance coverage at issue in this action, while substantial in amount, would not have been sufficient to supersede the Winkler County Judgment. (R III p. 19.) Thus, while it is true that dealings with Respondents' other insurers were of paramount importance in attempting to supersede the Winkler County judgment, at no time did Respondents' counsel represent that Respondents would never bring an action against Petitioners. The fourteen day notice provision in the parties' letter agreement clearly evidences this fact. (R II p. 141 ¶ 1.)

Respondents. That action was styled *Ronald Malcolm Pate-man, et al. v. Margaret Hunt Hill, et al.*, Cause No. 93-1658 and was filed in the 298th Judicial District Court in Dallas County, Texas. (R III pp. 4-5.) In light of the fact that Respondents' negotiations with their other insurers had fallen through and become the subject of litigation, Respondents saw no point in further postponing resolution of all of their insurance coverage questions with all of their insurers. Accordingly, on February 23, 1993, Respondents notified Petitioners of their intention to file suit in state court. Petitioners refiled this declaratory judgment action in the United States District Court for the Southern District of Texas that same day.

On March 26, 1993, Respondents filed an action against Petitioners in Texas state court (the "state court action").² That same day, Respondents filed their Rule 12 Motion to Dismiss or Stay in this case, requesting that this action be dismissed or stayed in deference to the state court action. On June 30, 1993, the district court granted Respondents' Rule 12 Motion, staying this action pending resolution of the state court action. In its order staying this action, the district court found that: (1) Petitioners filed their original declaratory judgment action in anticipation of litigation by Respondents; (2) the action was filed as a means of forum shopping; (3) Petitioners' rights would adequately be protected in the state court

² The state court action also names as plaintiffs various members of the Hunt family and their related entities (the "Hunt Group") who are also judgment debtors in the Winkler County litigation. The Hunt Group is likewise asserting claims for coverage and for bad faith against its insurers, Underwriters Indemnity Company and Planet Indemnity Company.

action in that Petitioners could assert their claims in this action as defenses or counterclaims in the state court proceeding; (4) exercising jurisdiction in this case would result in piecemeal litigation; and (5) it would be inequitable to allow Petitioners to gain precedence in the choice of forum. *See Appendix B to Petitioners' Petition for a Writ of Certiorari* at p. B-3. This ruling, which was affirmed by the Fifth Circuit Court of Appeals, is the subject of Petitioners' petition to this Court.

SUMMARY OF ARGUMENT

The judicially-formed "exceptional circumstances" test, which normally governs the determination of whether it is proper for a federal court to abstain from exercising its jurisdiction in a particular case, does not apply to declaratory judgment actions. Concerns that federal courts have a virtually unflagging obligation to exercise jurisdiction are irrelevant because Congress created the Declaratory Judgment Act and specifically gave the courts discretion concerning whether to hear declaratory judgment actions. Indeed, this Court, in *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 62 S. Ct. 1173, 86 L. Ed. 1620 (1942), has already determined that a court should not ordinarily exercise its discretion to hear a declaratory judgment action where there is another suit between the parties pending in state court that presents the same issues not governed by federal law.

This Court's rationale in *Brillhart* for allowing district courts broad discretion in determining whether to exercise jurisdiction in a declaratory judgment action had

three principal bases: (1) avoidance of having federal courts needlessly determine issues of state law; (2) discouraging litigants from filing declaratory judgment actions as a means of forum shopping; and (3) avoiding duplicative litigation. Each of these factors support abstention here. First, there is no dispute that this insurance coverage dispute is governed by state law. Second, the courts below correctly concluded that Petitioners brought this action in anticipation of litigation and that entertaining jurisdiction over this declaratory judgment action would reward Petitioners' attempts to forum shop. Third, the courts below properly recognized that declining the exercise of jurisdiction in this case would avoid duplicative litigation. Thus, under both the holding and rationale of this Court's decision in *Brillhart*, the district court's decision to abstain from exercising its jurisdiction was entirely proper.

Even if the "exceptional circumstances" test set forth in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 97 S. Ct. 1236, 47 L. Ed. 2d 483 (1976) and *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983) were applicable to a district court's determination of whether to exercise jurisdiction in a declaratory judgment action, the trial court properly refused to exercise jurisdiction in this case. The *Colorado River/Moses H. Cone* factors themselves run substantially parallel to the criteria that have been deemed relevant to a court's determination of whether to accept or decline jurisdiction in a declaratory judgment action, and, as applied in this case, support abstention. Significantly, Petitioners, while complaining of the Fifth Circuit's failure to apply the *Colorado*

River/Moses H. Cone factors, simply have not shown that a contrary result would have been reached had such factors been applied.

Finally, regardless of the standard of review applied – *de novo* or abuse of discretion – either standard would have yielded the same result in this case. Even so, all of the factors relating to the allowance of broad discretion to the district court in determining whether to entertain a declaratory judgment action support an abuse of discretion standard. The standard is consistent with not only the Declaratory Judgment Act, but common sense. The district courts, in fulfilling whatever obligation they may have to exercise jurisdiction, should not be deprived of the discretion to decline jurisdiction over a declaratory judgment action where, as here, the declaratory judgment action is instituted as a means of forum shopping, no issue of federal law is presented, and maintenance of two parallel suits would result in duplicative litigation.

ARGUMENT

The decision of the Fifth Circuit Court of Appeals is correct in affirming the district court's stay of this action pending determination of the parallel state court proceeding. Further, there is no conflict between the decision of the Fifth Circuit and cases previously decided by this Court. Thus, there is no basis for review of this case by this Court.

I. The Declaratory Judgment Act Does Not Obligate A District Court To Exercise Its Jurisdiction In A Declaratory Judgment Action.

The unique nature of declaratory judgment actions forms the basis for the departure from the general rule disfavoring abstention. *See* 17A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4247 at 118-20 (2nd ed. 1988) (noting the special nature of a declaratory judgment as supporting abstention in a declaratory judgment action). Generally, abstention is disfavored and “exceptional circumstances” are required before abstention is proper. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976); *see also* *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1 (1983). When an action is one for declaratory judgment, however, the district court has broad discretion to defer to a similar state action.

Declaratory relief, both by its nature and under the plain language of the Declaratory Judgment Act, 28 U.S.C. § 2201 (1982), is discretionary. *Public Affairs Assoc., Inc. v. Rickover*, 369 U.S. 111, 112 (1962) (per curiam). The Declaratory Judgment Act is an authorization, not a command. It gives federal courts competence to make a declaration of rights; it does not impose a duty to do so. *Id.*; *see also* Edwin Borchard, *Declaratory Judgments* at 231-41 (2nd ed. 1941). Congress appears explicitly to have authorized the exercise of discretion by using the word “may” in the Declaratory Judgment Act, 28 U.S.C. § 2201 (1982). David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U.L. Rev. 543, 548 n. 24 (1985) (discussing “traditional” equitable discretion not to proceed). The way to guarantee that district courts retain the discretion afforded under the

Act is through analysis under the Act. *Terra Nova Ins. Co. v. 900 Bar, Inc.*, 887 F.2d 1213, 1223 (3rd Cir. 1989).

The legislative history of the Declaratory Judgment Act itself shows that “large discretion is conferred upon the courts as to whether or not they will administer justice by the procedure.” *See* H.R. Rep. No. 1264, 73rd Cong., 2nd Sess., at 2 (1934).³ A district court is under no requirement to hear a declaratory judgment action before it can exercise its discretion to decline to enter the requested relief. The duty of a court to exercise its jurisdiction is not automatic or obligatory. *Brillhart*, 316 U.S. at 491; Edwin Borchard, *Declaratory Judgments* 312-13 (2nd ed. 1941); 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, § 2759 at 644 (1983) (noting that the draftsmen of the Act rejected the view that the terms of Act were mandatory and did not leave any discretion in the court to refuse jurisdiction).

The Declaratory Judgment Act is uncommon in that it neither imposes an unflagging duty upon the courts to decide declaratory judgment actions nor grants entitlement to litigants to demand declaratory remedies. *See* *Green v. Mansour*, 474 U.S. 64, 72 (1985). In declaratory

³ Petitioners’ representation of the content of the legislative history is incorrect. Petitioners claim that the legislative history of the act “makes it clear that the courts have no discretion to decline to hear a declaratory judgment action, but *must* allow the litigants an opportunity to be heard.” (Petition at p. 14). Nowhere in the reports cited by Petitioners is there any such implied, much less, explicit requirement. The report says the opposite, *See* H.R. Rep. No. 1264, 73rd Cong., 2nd Sess., at 2 (1934). Even so, *Brillhart* puts this issue to rest. *Brillhart*, 316 U.S. at 494.

judgment actions, the courts are under no compulsion to exercise their jurisdiction and ultimately, the decision whether to defer to the concurrent jurisdiction of a state court is a matter committed to the district court's discretion. *Brillhart*, 316 U.S. at 494. Thus, a federal court's obligation to decide virtually all questions within its jurisdiction is curtailed when complainants seek declaratory relief. *See generally* Edwin Borchard, *Discretion to Refuse Jurisdiction of Actions for Declaratory Judgments*, 26 Minn. L. Rev. 677 (1942).

In addition, the reason that the "exceptional circumstances" test does not apply to declaratory judgment actions arises from the genesis of *Colorado River* and *Moses H. Cone*, as opposed to the origin of the Declaratory Judgment Act. This Court's holdings in *Colorado River* and *Moses H. Cone* were designed to impose restrictions on the discretion of lower courts to abstain from exercising their jurisdiction on inappropriate grounds in cases not involving requests for relief under the Declaratory Judgment Act. *U.S. Fidelity & Guar. v. Algernon-Blair, Inc.*, 705 F. Supp. 1507, 1521 (M.D. Ala. 1988). Such a policy concern does not exist in the context of a declaratory judgment action. In contrast, a district court's discretion over declaratory judgment actions originates in Congress, which has authority to design such statutory relief. Congress gave the court discretion in determining whether to exercise its authority. *Id.*; *Brillhart*, 316 U.S. at 494; 28 U.S.C. § 2201; Shapiro, *Jurisdiction and Discretion*, *supra*, at 548 n. 24. Thus, the exceptional circumstances test does not apply to declaratory judgment actions, because the concerns that prompted articulation of that test (e.g., that the federal courts have a "virtually unflagging obligation

to exercise the jurisdiction given to them," *Colorado River*, 424 U.S. at 817), are irrelevant in an action for declaratory relief under 28 U.S.C. § 2201, where the court is under no compulsion to exercise its jurisdiction. *Terra Nova*, 887 F.2d at 1222.

Nor do Petitioners' citations to this Court's recent decisions in *McCarthy v. Madigan*, ___ U.S. ___, 112 S. Ct. 1081, 117 L. Ed. 2d 291 (1992) and *New Orleans Pub. Serv., Inc. v. New Orleans*, 491 U.S. 350, 109 S. Ct. 2506, 105 L. Ed. 2d 298 (1989) compel a different result. Petitioners cite *McCarthy* and *New Orleans* as authority for the proposition that a district court is obligated to exercise its jurisdiction in a declaratory judgment case absent the existence of the requisite *Colorado River/Moses H. Cone* exceptional circumstances. (Petition at pp. 14-15.) Neither case supports this proposition. The *McCarthy* case does not support Petitioners' position in that it is not a declaratory judgment action and it does not even discuss the issue of whether a district court has discretion to exercise its jurisdiction in such a case. Petitioners' reliance on *New Orleans* is likewise misplaced since that case (1) involves abstention under the *Burford* and *Younger* doctrines,⁴ which doctrines have no applicability to this case, and (2) likewise does not address the issue of whether the *Colorado River/Moses H. Cone* exceptional circumstances test applies to an action brought under the Declaratory Judgment Act. Thus, contrary to Petitioners' position, this Court has not determined that the *Colorado River/Moses H.*

⁴ See, *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943); *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 669 (1971).

Cone exceptional circumstances test governs the abstention determination in a declaratory judgment action. On the contrary, this Court has recognized, on more than one occasion, that the exercise of jurisdiction over a declaratory judgment action is a matter committed to the district court's discretion. *Brillhart*, 316 U.S. at 494; *Rickover*, 369 U.S. at 112. The Fifth Circuit's opinion in this case is wholly consistent with this Court's prior rulings on this issue. Accordingly, there is no basis for review of this case by this Court.

II. Even If The *Colorado River* And *Moses H. Cone* Factors Apply, The Trial Court Properly Addressed Those Factors In Refusing To Exercise Its Jurisdiction.

Petitioners argue that the Fifth Circuit should have applied the factors set forth in *Colorado River* and *Moses H. Cone* to determine whether the stay was proper. As set forth above, these factors have no applicability to an action brought under the Declaratory Judgment Act. Even if the *Colorado River* and *Moses H. Cone* factors were applied in this case, however, the district court properly determined to refuse to exercise jurisdiction. Significantly, Petitioners do not even attempt to illustrate that a contrary result would have been reached had these factors been applied. For these additional reasons, this case is not appropriate for consideration by this Court.

Under *Colorado River* and *Moses H. Cone*, the following factors are to be considered in determining whether to abstain from hearing a case due to the pendency of a similar state court action:

- (1) the avoidance of exercise of jurisdiction over particular property by more than one court;
- (2) the inconvenience of the federal forum;
- (3) the desirability of avoiding piecemeal litigation;
- (4) the order in which jurisdiction was obtained by the concurrent forums;
- (5) the applicability of federal or state law to the merits of the claims at issue; and
- (6) the adequacy of state court proceedings to protect the rights of the party that invoked the federal court's jurisdiction.

Moses H. Cone, 460 U.S. at 15-16; *Colorado River*, 424 U.S. at 818-19. These factors themselves run "substantially parallel" to the criteria that historically have been deemed relevant in determining whether to accept or decline jurisdiction under the Declaratory Judgment Act. *Fuller Co. v. Ramon I. Gil, Inc.*, 782 F.2d 306, 309 n. 3 (1st Cir. 1986). To the extent these factors were to apply in this case, they likewise support the district court's refusal to exercise jurisdiction.

A. The First *Colorado River/Moses H. Cone* Factor, Jurisdiction Over Real Property, is Irrelevant in This Case.

The first factor set forth in *Colorado River* is not an issue in this case because there is no issue of jurisdiction over real property. Thus, this factor is irrelevant and should not be given any consideration in the abstention

analysis. *Lumberman's Mut. Cas. v. Connecticut Bank & Trust*, 806 F.2d 411, 414 (2nd Cir. 1986).

B. Litigating This Dispute in Federal Court is No More Convenient Than Litigating This Dispute in State Court.

The second *Colorado River* factor weighs the convenience of the respective forums. *Colorado River*, 424 U.S. at 818. Petitioners are each located in England. (R II p. 105.) Respondents are each located in Dallas County, Texas. (R II pp. 105-06.) As a result, litigating this dispute in federal court in Houston, Texas would be no more convenient than litigating this dispute in state court in Houston, Texas. Accordingly, the convenience of the respective forums factor does not weigh in favor of the exercise of jurisdiction by the district court.

C. The Piecemeal Litigation Factor Weighs in Favor of Abstention.

The courts below properly concluded that resolving London Underwriters' claims in this case would not dispose of the state court proceeding and would result in piecemeal litigation. Accordingly, this factor weighs in favor of abstention.

D. Petitioners' Preemptive Filing of This Action Does Not Support the Exercise of Jurisdiction in the District Court.

The fourth *Colorado River* factor, the order in which jurisdiction was obtained, also favors abstention. The

mere fact that Petitioners' suit was on file first in no way compelled the district court to exercise its jurisdiction. In *Moses H. Cone*, this court made it clear that priority should not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions. *Moses H. Cone*, 460 U.S. at 21. Here, while both this case and the state court action were in their early stages, the state court action had progressed slightly further at the time the stay was entered in that Petitioners had filed responsive pleadings in the state court action. Thus, this factor weighs in favor of abstention.

The district court's specific finding that Petitioners first-filed declaratory judgment was filed in anticipation of litigation by Respondents and in an attempt to forum shop further supports the district court's decision not to exercise jurisdiction in this case. See, *Moses H. Cone*, 460 U.S. at 21 (finding that the party initiating the second-filed action had "no reasonable opportunity" to file its suit prior to the preemptive action); *Granite State Ins. Co. v. Tandy Corp.*, 762 F. Supp. 156, 160 (S.D.Tex. 1991), aff'd, 986 F.2d 94 (5th Cir. 1992), cert granted, 113 S. Ct. 51 (1992), cert dism'd, 113 S. Ct. 1836 (1993).

E. There is No Significant Federal Interest in This Suit.

It is undisputed that state law governs resolution of this coverage dispute. When there is another suit pending in state court presenting the same issues, not governed by federal law, between the same parties, a district court's discretion to grant relief under the Declaratory Judgment

Act ordinarily should not be exercised. *Brillhart*, 316 U.S. at 495. The absence of an issue of federal law in this case strongly counsels in favor of the district court's decision to decline to exercise its jurisdiction.

F. Petitioners' Rights are Adequately Protected in the State Court Proceeding.

The district court specifically determined that Petitioners could assert their claims in this action as defenses or counterclaims in the state court proceeding. Thus, Petitioners' rights are adequately protected in the state court proceeding and this abstention factor likewise favors abstention.

Accordingly, even if the *Colorado River* and *Moses H. Cone* factors were applicable, which Respondents deny, the district court nevertheless properly declined to exercise its jurisdiction in this case. As a result, there is no conflict with the result in this case and any decision of this Court or with any decision of any other circuit, and Petitioners present no question that merits this Court's review.

III. Under Either A *De Novo* Or Abuse Of Discretion Standard, The District Court's Stay Order Was Proper.

Finally, Petitioners complain of the failure of the Fifth Circuit to review the district court's decision to stay under an abuse of discretion standard rather than by *de novo* review. As applied to this case, which standard applies is irrelevant since the stay order would have been upheld regardless of the standard of review used.

This Court has already determined that a district court should not ordinarily exercise its discretion to hear declaratory judgment actions where there is another suit between the parties pending in state court that presents the same issues, not governed by federal law. *Brillhart*, 316 U.S. at 495. The rationale in *Brillhart* for allowing district courts broad discretion in determining whether to exercise jurisdiction in a declaratory judgment action had three principal bases: (1) avoidance of having federal courts needlessly determine issues of state law; (2) discouraging litigants from filing declaratory judgment actions as a means of forum shopping; and (3) avoiding duplicative litigation. *Chamberlain v. Allstate Ins. Co.*, 931 F.2d 1361, 1366-67 (9th Cir. 1991). Each of these three factors supports abstention here. First, there is no dispute that this insurance coverage dispute is governed by state law. Second, the district court correctly concluded that Petitioners brought this action in anticipation of litigation and that entertaining jurisdiction over this declaratory judgment action would reward Petitioners' attempts to forum shop. Finally, the courts below properly recognized that declining the exercise of jurisdiction in this case would avoid duplicative litigation. Review of these factors by *de novo* review rather than by an abuse of discretion standard would not change the result.

Petitioners are correct insofar as some circuits use *de novo* review rather than an abuse of discretion standard. In spite of the different standards, however, there is no practical difference in the result. The fact that the other circuits, regardless of the standard applied, would have affirmed the stay order is demonstrated by Petitioners' own authority. Five of the seven declaratory judgment

cases cited by Petitioners that review abstention *de novo* in declaratory judgment actions (Petition at 9-11) support Respondents' position, because in them the appellate courts ordered abstention. *Continental Cas. Co. v. Robsac Industries*, 947 F.2d 1367 (9th Cir. 1991); *Allstate Ins. v. Mercier*, 913 F.2d 273 (6th Cir. 1990); *International Harvester Co. v. Deere & Co.*, 623 F.2d 1207 (7th Cir. 1980); *Hanes Corp. v. Millard*, 531 F.2d 585 (D.C. Cir. 1976); *40235 Washington Street Corp. v. Lusardi*, 976 F.2d 587, 588-89 (9th Cir. 1992). In each of these cases other than *Lusardi*, the district court actually assumed jurisdiction over a declaratory judgment action and the appellate court reversed the district court's refusal to abstain.⁵

Only two of the declaratory judgment cases relied upon by Petitioners actually resulted in a determination that abstention was inappropriate. In both of those cases, however, the determination that abstention was improper hinged on factors not present here. In *Cincinnati Ins. Co. v. Holbrook*, 867 F.2d 1330, 1333 (11th Cir. 1989), abstention was held to be inappropriate because no adequate remedy was provided under state law in that state law would not have allowed resolution of a declaratory judgment action until the underlying claim had been resolved. Here, state law does provide an adequate remedy as evidenced by the district court's determination that Petitioners' rights would adequately be protected in the state court proceeding. Similarly, in *American Mfrs. Mut. Ins. Inc. v. Edward D. Stone, Jr. & Assoc.*, 743 F.2d 1519, 1524-25

⁵ In *Lusardi*, the Ninth Circuit affirmed a district court's decision to abstain from exercising its jurisdiction in a declaratory judgment action.

(11th Cir. 1984), abstention was held to be inappropriate because the parallel state court action would not have resolved the issues pending in the federal action. No such consideration exists in this case.

Nonetheless, as a general principle, an abuse of discretion standard is appropriate for review of a district court's decision to abstain. See *infra* at § I. Petitioners' apparent contention that an abuse of discretion standard permits district courts "unfettered discretion" (Petition at p. 17) is misplaced. Broad discretion is not absolute discretion. In *Brillhart*, this Court counseled district courts to:

. . . ascertain whether the questions in controversy between the parties to the federal suit, and which are not foreclosed under the applicable substantive law, can better be settled in the proceeding in the state court The federal court may have to consider whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding, whether necessary parties have been joined, whether such parties are amenable to process in that proceeding, etc.

Brillhart, 316 U.S. at 495. Similarly, in applying the rationale of *Brillhart*, the Fifth Circuit has formulated at least six nonexclusive factors which may be considered by a district court in determining whether abstention in a declaratory judgment action is appropriate. See, *Travelers Ins. Co. v. Louisiana Farm Bureau Federation, Inc.*, 996 F.2d 774, 778-79 (5th Cir. 1993).⁶ Thus, there simply is no basis

⁶ Petitioners complain that the six factor test formulated by the Fifth Circuit does not incorporate three *Colorado River/Moses*

for concluding that review under an abuse of discretion standard on appeal equates to providing a district court with unfettered discretion to refuse to exercise jurisdiction in a declaratory judgment action.

CONCLUSION

The consequences of Petitioners' argument in this case is that if an insurance company decides to shop for what it perceives to be a more advantageous forum, it can do so by racing to a federal courthouse with a declaratory judgment action which presents no issue of federal law for the district court's determination. Regardless of the degree of bad faith in which that action is brought, the district court would have little or no discretion over whether to hear it in the face of a parallel state court proceeding instituted by an insured. Thus, the natural consequence of requiring a district court to exercise its jurisdiction over a preemptive declaratory judgment

H. Cone factors: (1) jurisdiction over real property; (2) the applicability of federal law; and (3) precedence of filing. Petition at p. 17, n. 18. As discussed previously, the first two factors are not applicable in this case and the third factor actually supports abstention in light of the district court's determination that this action was filed in anticipation of litigation and as a means of forum shopping. *See infra* at § II. Moreover, in arguing that the Fifth Circuit erred in failing to apply these three *Colorado River/Moses H. Cone* factors, none of which weighs in favor of the district court's exercise of jurisdiction, Petitioners have implicitly acknowledged that, even if the courts below had expressly applied the exceptional circumstances test, abstention nevertheless would have been required.

action such as the one at issue in this case would be to promote, not avoid, duplicative litigation.

This Court in *Brillhart*, has already determined that, in this situation, a district court should not exercise jurisdiction over a declaratory judgment action. Such a result is especially appropriate in this case in light of the district court's express determinations that this suit was filed as a means of forum shopping, that Petitioners' rights would be adequately protected in the state court proceeding and that declining jurisdiction would avoid duplicative litigation. Thus, in exercising its discretion, the district court properly stayed this action in deference to the state court action. In reviewing the action of the district court, regardless of the standard of review applied, the result is the same. The district court acted properly.

For these reasons, the Court should deny the petition for writ of certiorari.

Respectfully submitted,

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Counsel for Respondents

October 28, 1994

No. 94-562

In The

JAN 11 1995

Supreme Court of the United States

October Term, 1994

LESLIE WILTON, ON BEHALF OF HIMSELF AND AS A REPRESENTATIVE OF CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON, AND CERTAIN INSTITUTE OF LONDON UNDERWRITERS COMPANIES, AS FOLLOWS, THE ORION INSURANCE COMPANY, PLC, SKANDIA U.K. INSURANCE PLC, THE YASUDA FIRE & MARINE INSURANCE COMPANY OF EUROPE, LTD., OCEAN MARINE INSURANCE CO., LTD., YORKSHIRE INSURANCE CO., LTD., MINSTER INSURANCE CO., LTD., PRUDENTIAL ASSURANCE CO., LTD., PEARL ASSURANCE PLC, BISHOPSGATE INSURANCE LTD., HANSA MARINE INS. CO. (UK) LTD., VESTA (UK) INS. CO., LTD., NORTHERN ASSURANCE CO., LTD., CORNHILL INSURANCE CO., LTD., SIRIUS INSURANCE CO., (UK) LTD., SOVEREIGN MARINE & GENERAL INSURANCE CO., TOKIO MARINE & FIRE INSURANCE (UK) LTD., TAISHO MARINE & FIRE INSURANCE CO., (UK) LTD., STOREBRAND INSURANCE CO. (UK) LTD., ATLANTIC MUTUAL INSURANCE CO., ALLIANZ INTERNATIONAL INSURANCE CO., LTD., AND WAUSAU INSURANCE CO. (UK) LTD.,

Petitioners,
versus

SEVEN FALLS COMPANY, MARGARET HUNT HILL, ESTATE OF A. G. HILL, LYDA HILL, ALINDA H. WIKERT, AND U.S. FINANCIAL CORP.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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Petition For Certiorari Filed September 26, 1994
Certiorari Granted November 28, 1994

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CLOSED APPEAL

U.S. District Court
TXS - Southern District of Texas (Houston)

CIVIL DOCKET FOR CASE #: 93-CV-531

Wilton, et al v. Seven
Falls Company, et al
Assigned to: Judge David
Hittner

Demand: \$0,000
Lead Docket: None
Dkt# in other court: None

Cause: 28:2201 Declaratory
Judgment

LESLIE WILTON, On
behalf of himself and as a
representative of certain
underwriters at Lloyd's of
London and certain
Institute of London
Underwriters Companies
as follows,
plaintiff

THE ORION COMPANIES
PLC
plaintiff

SKANDIA U K
INSURANCE PLC
plaintiff

YASUDA FIRE &
MARINE, Insurance
Company of Europe Ltd
plaintiff

OCEAN MARINE
INSURANCE COMPANY
LIMITED
plaintiff

Filed: 02/23/93

Nature of Suit: 110
Jurisdiction: Diversity

Michael A Orlando
[COR LD NTC]
Meyer Orlando & Evans
2929 Allen Pkwy
Ste 2300
Houston, TX 77019
713-523-1101

Michael A Orlando
(See above)
[COR LD NTC]

Michael A Orlando
(See above)
[COR LD NTC]

Michael A Orlando
(See above)
[COR LD NTC]

YORKSHIRE INS CO LTD plaintiff	Michael A Orlando (See above) [COR LD NTC]
MINSTER INSURANCE CO LTD plaintiff	Michael A Orlando (See above) [COR LD NTC]
PRUDENTIAL ASSURANCE, CO LTD plaintiff	Michael A Orlando (See above) [COR LD NTC]
PEARL ASSURANCE PLC plaintiff	Michael A Orlando (See above) [COR LD NTC]
BISHOPSGATE INSURANCE LIMITED plaintiff	Michael A Orlando (See above) [COR LD NTC]
HANSA MARINE INS CO, (UK) LTD plaintiff	Michael A Orlando (See above) [COR LD NTC]
VESTA (UK) INSURANCE COMPANY LIMITED plaintiff	Michael A Orlando (See above) [COR LD NTC]
NORTHERN ASSURANCE COMPANY LTD plaintiff	Michael A Orlando (See above) [COR LD NTC]
CORNHILL INSURANCE COMPANY LTD plaintiff	Michael A Orlando (See above) [COR LD NTC]
SIRIUS INSURANCE CO (UK) LTD plaintiff	Michael A Orlando (See above) [COR LD NTC]
SOVEREIGN MARINE & GENERAL INSURANCE COMPANY LIMITED plaintiff	Michael A Orlando (See above) [COR LD NTC]

TOKIO MARINE & FIRE, INSURANCE (UK) LTD plaintiff	Michael A Orlando (See above) [COR LD NTC]
TAISHO MARINE & FIRE INSURANCE CO (UK) LTD plaintiff	Michael A Orlando (See above) [COR LD NTC]
STOREBRAND INSURANCE CO (UK) LTD plaintiff	Michael A Orlando (See above) [COR LD NTC]
ATLANTIC MUTUAL INSURANCE CO plaintiff	Michael A Orlando (See above) [COR LD NTC]
ALLIANZ INTERNATIONAL INSURANCE CO LTD plaintiff	Michael A Orlando (See above) [COR LD NTC]
WAUSAU INSURANCE CO (UK) LTD plaintiff	Michael A Orlando (See above) [COR LD NTC]
v.	
SEVEN FALLS COMPANY defendant	Werner A Powers [COR LD NTC] Haynes & Boone 901 Main Ste 3100 Dallas, TX 75202-3714 214 651 5000
MARGARET HUNT HILL defendant	Werner A Powers (See above) [COR LD NTC]
A G HILL, Estate of defendant	Werner A Powers (See above) [COR LD NTC]

LYDA HILL
defendant
Werner A Powers
(See above)
[COR LD NTC]

ALINDA H WIKERT
defendant
Werner A Powers
(See above)
[COR LD NTC]

U S FINANCIAL CORP
defendant
Werner A Powers
(See above)
[COR LD NTC]

2/23/93 1 COMPLAINT filed; FILING FEE \$ 120
RECEIPT # 0133 (ad) [Entry date
02/25/93]

2/23/93 -- SUMMONS issued for Seven Falls Company, Margaret Hunt Hill, A G Hill, Lyda Hill, Alinda H Wikert, U S Financial Corp (ad) [Entry date 02/25/93] [Edit date 03/01/93]

2/23/93 2 ORDER, set scheduling conference for 11:00 6/22/93, entered; Parties notified. (signed by Judge David Hittner) (ad) [Entry date 02/25/93]

3/26/93 3 ANSWER to Complaint by Seven Falls Company, Margaret Hunt Hill, A G Hill, Lyda Hill, Alinda H Wikert, U S Financial Corp (Added attorney Werner A Powers), filed. (mh) [Entry date 03/29/93]

3/26/93 3 MOTION to dismiss, or to stay by Seven Falls Company, Margaret Hunt Hill, A G Hill, Lyda Hill, Alinda H Wikert, U S Financial Corp, Motion Docket Date

4/15/93 [3-1] motion, 4/15/93 [3-2] motion, filed (mh) [Entry date 03/29/93]

3/26/93 4 AFFIDAVIT of Charles C. Keeble, Jr., Re: [3-1] motion to dismiss, [3-2] motion to stay, filed (mh) [Entry date 03/29/93]

4/15/93 5 MEMORANDUM w/affidavit by Plaintiffs, Leslie Wilton, et al, in opposition to defendants' [3-1] motion to dismiss, [3-2] motion to stay, filed (la) [Entry date 04/16/93]

4/22/93 6 REPLY by Seven Falls Company, Margaret Hunt Hill, A G Hill, Lyda Hill, Alinda H Wikert, U S Financial Corp in support of rule 12 response and [3-1] motion and brief to dismiss, [3-2] motion and brief to stay, filed. (la) [Entry date 04/23/93]

5/20/93 7 RESPONSE by Leslie Wilton, et al, in opposition to defendants' [6-1] reply in support of [3-1] motion to dismiss, filed (la) [Entry date 05/21/93]

6/1/93 8 ORDER re hearing CTRM 8A, Motion hearing set for 9:30 a.m. 6/9/93 for [3-1] motion to dismiss, set for 9:30 a.m. 6/9/93 for [3-2] motion to stay, entered; Parties notified. (signed by Judge David Hittner) (la) [Entry date 06/03/93]

6/11/93 9 Motion hearing held before Judge David Hittner re: [3-1] motion to dismiss Motion hearing held; [3-2] motion to stay Motion hearing held; Order to issue; Ct Reporter:

Faris; Appearances: M Orlando f/pltf; C Keeble f/deft (la) [Entry date 06/15/93]

6/30/93 10 ORDER terminating defendant's [sic] [3-1] motion to dismiss; granting defendant's [sic] [3-2] motion to stay; ordering case STAYED pending resolution of Hill, et al v Wilton, et al, No. 93-03542, currently pending in the 299th Judicial District Court of Travis County, Texas, entered; Parties notified. (signed by Judge David Hittner) (la) [Entry date 07/02/93]

6/30/93 -- Case closed (la) [Entry date 07/02/93]

7/29/93 11 NOTICE OF APPEAL of [10-1] order by Leslie Wilton, Orion Companies The, Skandia U K Ins PLC, Yasuda Fire & Marine, Ocean Marine Ins Co, Yorkshire Ins Co Ltd, Minster Ins Co Ltd, Prudential Assurance, Pearl Assurance PLC, Bishops-gate Ins Ltd, Hansa Marine Ins Co, Vesta (UK) Ins Co, Northern Assur Co, Cornhill Ins Co Ltd, Sirius Ins Co (UK), Sovereign Marine &, Tokio Marine & Fire, Taisho Marine & Fire, Storebrand Ins Co, Atlantic Mutual Ins, Allianz Intl Ins Co, Wausau Ins Co (UK), filed. Fee Status: Pd Receipt #: 426514 (bw) [Entry date 08/05/93]

8/5/93 -- Notice of appeal and certified copy of docket transmitted to USCA: [11-1] appeal (bw)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LESLIE WILTON, ON BEHALF OF
HIMSELF AND AS A
REPRESENTATIVE OF CERTAIN
UNDERWRITERS AT LLOYD'S OF
LONDON, AND CERTAIN
INSTITUTE OF LONDON
UNDERWRITERS COMPANIES, AS
FOLLOWS, THE ORION
INSURANCE COMPANY, PLC,
SKANDIA U.K. INSURANCE PLC,
THE YASUDA FIRE & MARINE
INSURANCE COMPANY OF
EUROPE LTD., OCEAN MARINE
INSURANCE CO., LTD., YORKSHIRE
INSURANCE CO., LTD., MINSTER
INSURANCE CO., LTD.,
PRUDENTIAL ASSURANCE CO.,
LTD., PEARL ASSURANCE PLC,
BISHOPSGATE INSURANCE LTD.,
HANSA MARINE INS. CO. (UK)
LTD., VESTA (UK) INS. CO. LTD.,
NORTHERN ASSURANCE CO.,
LTD., CORNHILL INSURANCE CO.,
LTD., SIRIUS INSURANCE CO., (UK)
LTD., SOVEREIGN MARINE &
GENERAL INSURANCE CO., TOKIO
MARINE & FIRE INSURANCE (UK)
LTD., TAISHO MARINE & FIRE
INSURANCE CO. (UK) LTD.,
STOREBRAND INSURANCE CO.
(UK) LTD., ATLANTIC MUTUAL
INSURANCE CO., ALLIANZ
INTERNATIONAL INSURANCE CO.
LTD., AND WAUSAU INSURANCE
CO. (UK) LTD.

§ (Filed
§ Feb. 23, 1993)

H-93-0531

Plaintiffs,

C.A. No.

vs.

SEVEN FALLS COMPANY,
MARGARET HUNT HILL, ESTATE
OF A. G. HILL, LYDA HILL,
ALINDA H. WIKERT, AND U.S.
FINANCIAL CORP.

Defendants.

ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE:

Leslie Wilton, on behalf of himself and as a representative of certain Underwriters at Lloyd's of London, and certain Institute of London Underwriters companies, as follows: The Orion Insurance Company, PLC, Skandia U.K. Insurance PLC, The Yasuda Fire & Marine Insurance Company of Europe Ltd., Ocean Marine Insurance Co., Ltd., Yorkshire Insurance Co., Ltd., Minster Insurance Co., Ltd., Prudential Assurance Co., Ltd, Pearl Assurance PLC, Bishopsgate Insurance Ltd., Hansa Marine Ins. Co. (UK) Ltd., Vesta (UK) Ins. Co. Ltd., Northern Assurance Co., Ltd., Cornhill Insurance Co., Ltd., Sirius Insurance Co., (UK) Ltd., Sovereign Marine & General Insurance Co. Ltd., Tokio Marine & Fire Insurance (UK) Ltd., Taisho Marine & Fire Insurance Co. (UK) Ltd., Storebrand Insurance Co. (UK) Ltd., Atlantic Mutual Insurance Co., Allianz International Insurance Co. Ltd., and Wausau Insurance Co. (UK) Ltd., all as specified on the attached Exhibit "A," plaintiffs, file this their Original Complaint complaining of Seven Falls Company, Margaret Hunt Hill, Estate of A. G. Hill, Lyda Hii, Alinda H. Wikert, and U.S. Financial Corp., defendants, and for cause of action would respectfully show:

1. Each specified Lloyd's Syndicate and Institute of London Underwriters Company listed on Exhibit "A" is an insurer duly organized and existing under the laws of the United Kingdom. Each has its principal office in or around London, England. Leslie Wilton is an individual who is a resident and citizen of the United Kingdom.
2. Seven Falls Company is a corporation duly organized and existing under the laws of the State of Delaware with its principal place of business in Dallas, Texas. Such defendant may be served through its agent for service of process: Werner A. Powers, Haynes & Boone, 3100 Nationsbank Plaza, 901 Main Street, Dallas, Texas 75202-3714.

Margaret Hunt Hill is an individual who is a resident and citizen of the State of Texas. She may be served through her agent for service of process: Werner A. Powers, Haynes & Boone, 3100 Nationsbank Plaza, 901 Main Street, Dallas, Texas 75202-3714.

The Estate of A. G. Hill is a duly probated estate within the State of Texas acting through Margaret Hunt Hill as the estate's duly appointed executrix may be served by serving the agent for service of process: Werner A. Powers, Haynes & Boone, 3100 Nationsbank Plaza, 901 Main Street, Dallas, Texas 75202-3714.

Lyda Hill is an individual who is a resident and citizen of the State of Texas. She may be served by serving her agent for service of process: Werner A. Powers, Haynes & Boone, 3100 Nationsbank Plaza, 901 Main Street, Dallas, Texas 75202-3714.

Alinda H. Wikert is an individual who is a resident and citizen of the State of Texas. She may be served by serving her agent for service of process: Werner A. Powers, Haynes & Boone, 3100 Nationsbank Plaza, 901 Main Street, Dallas, Texas 75202-3714.

U.S. Financial Corporation is a corporation duly organized and existing under the laws of the State of Texas with its principal place of business located in Dallas, Texas. Such defendant may be served by serving its agent for service of process: Werner A. Powers, Haynes & Boone, 3100 Nationsbank Plaza, 901 Main Street, Dallas, Texas 75202-3714.

3. Jurisdiction is founded on Title 28 U.S.C.A. § 1332 as there is diversity of citizenship between plaintiffs and defendants and the amount in controversy exceeds \$50,000.00.

4. Venue is proper in this judicial district because the insurance policies which are the basis of this proceeding were executed and issued in Houston, Texas.

5. This petition is brought pursuant to Title 28 U.S.C.A. § 2201 and pursuant to Rule 57, Federal Rules of Civil Procedure. Plaintiffs hereby request a speedy hearing. Plaintiffs seek construction of five policies of insurance identified as Certificate Nos. JHB 890172, JHB 890174, JHB 890175, JHB 890176 and JHB 890177. Except for the persons and entities listed as "Named Insureds," each of such policies is identical in all material respects. Copies of each of the five certificates as well as the full policy of insurance for certificate JHB 890172 are attached hereto as Exhibit "B." Plaintiffs, each for their several interests as specified in Exhibit "A," seek a declaration

that the policies of insurance provide no coverage or defense obligations for any of the liabilities related to certain lawsuits pending in Winkler County, Texas and Dallas County, Texas in which the defendants are parties. The subject lawsuits are identified as: Heritage Resources, Inc. et al., vs. A. G. Hill, et al., Cause No. 11,763 consolidated with Cause No. 11,885, styled as Heritage Resources, Inc., et al v. Sherman Hunt, et al., in the 109 Judicial District Court, Winkler County, Texas; and Tribal Drilling, et al. vs. Heritage Resources, Inc., et al., Cause No. 87-16819-A, in the 162nd Judicial District Court of Dallas County, Texas.

6. Plaintiffs have previously sent to defendants letters setting forth the reasons that these policies do not cover the claims being asserted against defendants by the Heritage Group of parties. Those letters are attached hereto as Exhibit "C," and fully incorporated herein. Plaintiffs assert herein the same reasons stated in such letters as the basis for a declaration that there is no coverage under the policies and no duty to defend. In general, there has been no occurrence that would trigger coverage under these policies, nor has there been any bodily injury, property damage, person injury or advertising injury alleged that would fit within the terms and conditions of the policies. Further, in general, there are exclusions that exclude the underlying claims from coverage under the policies and the alleged incidents which are the basis of the underlying claims did not fall within the time frame for coverage under the policies.

7. There has been a trial of the consolidated Winkler County cases and the jury returned a verdict in the total amount of \$83,823,864.00 plus attorney's fees. Further, the

alleged obligations to defend the defendants greatly exceed the minimum jurisdictional requirements of \$50,000.00. The Winkler County district court has entered judgement on the jury verdict for approximately \$66 million plus attorneys fees, interest and costs. A true and correct copy of the judgment against these defendants is attached hereto as Exhibit "D." The Dallas County case is still pending and is set for trial in the spring of 1993. The plaintiffs seek a declaration that none of the five policies of insurance, each with limits of \$1 million, provides coverage or defense obligations to the defendants for the Winkler County judgment or the Dallas County case.

8. All conditions precedent to the filing of this proceeding have been taken or have occurred.

WHEREFORE, plaintiffs request that defendants be summoned to appear and answer and that on final trial plaintiffs have judgment:

1. declaring that the policies identified as Certificate Nos. JHB 890172, JHB 890174, JHB 890175, JHB 890176 and JHB 890177 provide no coverage for the defendants for liabilities relating to judgment entered for the Heritage Group in the Winkler County case or on the counter-claims asserted by the Heritage Group in the Dallas County case;

2. declaring that plaintiffs were not and are not obligated to defend the defendants against the claims asserted in the Dallas County or Winkler County cases;

3. alternatively, declaring, that if there is any coverage of any claims asserted by the Heritage Group against the defendants that such coverage is restricted by the

terms, conditions, warranties, and limits of liability as contained in the subject policies of insurance; and

4. that plaintiff's receive such reasonable attorneys fees and costs incurred in prosecuting this declaratory judgment suit as are allowed by law; and
5. for such other and further relief to which plaintiffs may be justly entitled.

Respectfully submitted,

/s/ Michael A. Orlando

Michael A. Orlando

State Bar No. 15302700

Attorney in Charge for Plaintiffs,
LESLIE WILTON ON BEHALF OF
HIMSELF AND AS REPRESENTA-
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TERS AT LLOYD'S OF LONDON
AND CERTAIN MEMBER COM-
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Telephone: (713) 523-1101

Fax: (713) 523-2002

OF COUNSEL:

MEYER ORLANDO & EVANS PC

[Exhibits omitted in printing.]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Plaintiffs,

v.

SEVEN FALLS COMPANY,
MARGARET HUNT HILL,
ESTATE OF A.G. HILL,
LYDA HILL, ALINDA H.
WIKERT, AND U.S.
FINANCIAL CORP.

Defendants.

**DEFENDANTS' RULE 12 RESPONSE AND MOTION
AND BRIEF TO DISMISS OR TO STAY**

Defendants Seven Falls Company, Margaret Hunt Hill, Estate of A.G. Hill, Lyda Hill, Alinda H. Wikert and U.S. Financial Corporation file this Rule 12 Response and Motion and Brief to Dismiss or Stay this action and would respectfully show the Court as follows.

I.
FACTS

This insurance coverage dispute arises out of three lawsuits, two of which were consolidated in the District Court of Winkler County, Texas. The third lawsuit is pending in the District Court in Dallas County. In late September, 1992 the consolidated Winkler County suits proceeded to trial. After a three week trial, a verdict in excess of \$100 million was rendered against, among others, the Defendants in this case who are insureds under the five policies of insurance at issue in this action. Plaintiffs (the "Insurers") were given notice of this verdict by Defendants' (the "Insureds'") counsel in November, 1992. *See Affidavit of Charles C. Keeble, Jr. ("Keeble Affidavit") at ¶ 2, Ex. "A".* Shortly thereafter, on December 9, 1993, the Insureds instituted Civil Action No. H-92-3749, a suit identical to this one, in this Court. That suit was dismissed without prejudice pursuant to an agreement of counsel which required the Insureds to give ten days notice of their intent to commence any future litigation against the Insureds. *See Keeble Affidavit at ¶ 3, Ex. "B".* Such notice was given on February 23, 1993. *Keeble Affidavit at ¶ 4, Ex. "C".* As a result of this notice, the insureds refiled this action.

On March 26, 1993, the Insureds filed an action in state court in Travis County, Texas (the "Travis County Action") against the Insureds. *Keeble Affidavit at ¶ 5, Ex. "D".* In the Travis County Action, the Insureds assert, *inter alia*, claims for breach of contract, declaratory relief, injunctive relief and breach of the duty of good faith and

fair dealing. These claims arise not only out of the policies at issue in this litigation, but also out of a number of additional policies issued through Lloyd's to the Insureds named as Defendants in this case and to a number of other insureds who are not parties in this case but who are judgment debtors in the Winkler County action and who are plaintiffs seeking coverage in the Travis County action. The Insureds, as the real plaintiffs in this insurance coverage dispute, now request this Court to stay or dismiss this action in deference to the more comprehensive Travis County Action where the claim asserted by the Insureds in this action could be raised as a defense or counterclaim.

A. This Court Should Decline To Exercise Its Discretionary Jurisdiction Over This Declaratory Judgment Action.

This Court's exercise of jurisdiction to grant declaratory relief is discretionary rather than mandatory.¹ *Brillhart v. Excess Ins. of Am.*, 316 U.S. 491, 494 (1942); *Commercial Metals Co. v. Balfour, Guthrie & Co.*, 577 F.2d 264, 266 (5th Cir. 1978); *909 Corp. v. Village of Boling Brook Police Pension Fund*, 741 F. Supp. 1290, 1292 (S.D. Tex. 1990); *Granite State Ins. Co. v. Tandy Corp.*, 762 F. Supp. 156, 157 (S.D. Tex. 1991) aff'd 959 F.2d 968, cert. granted 113 S. Ct. 51 (1992). A district court's discretion to grant relief under the Declaratory Judgments Act ordinarily

¹ The purely remedial and equitable nature of a declaratory judgment action sets declaratory judgment actions outside the scope of traditional abstention analysis. *See, Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599, 601 n. 1 (5th Cir. 1983).

should not be exercised where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties. *Brillhart*, 316 U.S. at 495; *Continental Cas. Co. v. Robsac Industries*, 947 F.2d 1367, 70 (9th Cir. 1991) (" . . . when a state court action is pending presenting the same issue of state law as is presented in a federal declaratory suit, there exists a presumption that the entire suit should be heard in state court").

In *Granite*, this Court noted two factors to consider in determining whether to stay or dismiss a federal declaratory judgment action in favor of a pending state court action: (1) whether exercising jurisdiction would encourage piecemeal litigation; and (2) whether the declaratory judgment action was filed as a means of forum shopping. *Granite*, 762 F. Supp. at 157. In *Robsac*, the court noted two additional factors to be considered in determining whether an insurer's federal declaratory judgment action should be stayed or dismissed in favor of a parallel state action: (1) the need to avoid having federal courts needlessly determine issues of state law; and (2) the need to avoid duplicative litigation. *Robsac*, 947 F.2d at 1371. Applying these factors to the case at hand compels the conclusion that the Court should abstain from exercising its jurisdiction in this case.

1. Declining Jurisdiction in this Case Will Avoid Piecemeal Litigation.

A primary consideration in a court's decision to exercise jurisdiction in a declaratory judgment case is whether, due to the pendency of other proceedings, the

court's exercise of jurisdiction will result in the piecemeal adjudication of a dispute. *Granite*, 762 F. Supp. at 157. This Court would avert piecemeal litigation by abstaining from exercising its jurisdiction in this action. The Travis County Action is more comprehensive in the number of policies at issue in the litigation, the number of insureds seeking coverage under the Lloyd's policies and in the claims it presents. Thus, the Travis County Action is more likely to lead to a complete resolution of the parties' dispute.

The complaint in this action seeks only declaratory relief with regard to certain policies issued to the Insureds covering the 1988-1989 period. The Travis County Action seeks declaratory relief, injunctive relief, compensatory and punitive damages and asserts claims under the policies at issue in this action and under a number of policies covering the years beyond 1988-1989. Because the Travis County Action is the more comprehensive action, if this Court decides to exercise its jurisdiction, issues would remain to be litigated in Travis County upon completion of this case. Nor can the Insureds seriously contend that they will be unable to litigate the coverage issues raised by their complaint in the Travis County action if this Court declines to exercise jurisdiction in this case. Thus, the Travis County action is more likely to lead to a complete resolution of the dispute and staying or dismissing this action will avoid piecemeal litigation. See *Robsac*, 947 F.2d at 1373.

2. The Declaratory Judgment Action Before this Court was Filed as a Means of Forum Shopping.

An additional factor which a court may consider in determining whether to exercise jurisdiction in a declaratory judgment action is whether the complaint for declaratory relief was filed in anticipation of the filing of a suit by a defendant in the declaratory action. *Granite*, 762 F. Supp[.] at 157. Based on the timing of the original filing of this action shortly after the Defendants received notice of the verdict in the Winkler County litigation, it is clear that the Insurers' filing of this action was done in anticipation of the filing of suit by their insureds. In such a case, the Court, in the exercise of its discretion, should refuse to exercise jurisdiction. *RobSac*, 947 F.2d at 1371-73 (noting that "whether the [insurer's] federal declaratory judgment action regarding insurance coverage is filed first or second, it is reactive, and permitting it to go forward when there is a pending state court case presenting the identical issue would encourage forum shopping in violation of . . . *Brillhart*. . . ."); *Granite*, 762 F. Supp. at 157-58.

3. This Court Can Avoid Needless Determinations of State Law by Declining to Exercise its Jurisdiction in this Case.

The precise state law issues at stake in this action are the subject of the Travis County Action. Texas law provides the rule of decision in both this case and the Travis County Action. Where, as here, the sole basis of jurisdiction is diversity of citizenship, the federal interest is

minimal and the policy of avoiding unnecessary declarations of state law is especially [sic] strong, *RobSac*, 947 F.2d at 1371.

4. Declining to Exercise Jurisdiction in this Case Would Avoid Duplicative Litigation.

The policy of avoiding duplicative litigation would be frustrated by permitting this action to go forward during the pendency of the state court action as the coverage issues presented in this case can be resolved in the more comprehensive Travis County Action. See generally, *RobSac*, 947 F.2d at 1371-73.

B. Conclusion.

For the reasons set forth herein, this Court should, in the exercise of its discretion, abstain from exercising its jurisdiction in this case.

Respectfully submitted,

/s/ Werner A. Powers
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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing was served on opposing counsel in accordance with the Federal Rules of Civil Procedure on March 26, 1993.

/s/ Charles C. Keeble, Jr.
 Charles C. Keeble, Jr.

[Affidavit and attachments omitted in printing.]

IN THE UNITED STATES DISTRICT COURT
 FOR THE SOUTHERN DISTRICT OF TEXAS
 HOUSTON DIVISION

LESLIE WILTON, On Behalf of Himself and as a Representative of Certain Underwriters at Lloyd's of London, et al.,	§	CIVIL ACTION NO. H-93-531
Plaintiffs,	§	
v.	§	
SEVEN FALLS COMPANY, et al.,	§	
Defendants.	§	

O R D E R

[Filed July 2, 1993]

Pending before this Court is a motion to dismiss or to stay (Document #3) filed by defendants Seven Falls Company, Margaret Hunt Hill, Estate of A.G. Hill, Lyda Hill, Alinda H. Wikert, and U.S. Financial Corporation. After having considered the motion, the submissions of the parties, and the applicable law, the Court determines that this action should be stayed.

Plaintiffs Leslie Wilton, on behalf of himself and as a representative of certain Underwriters at Lloyd's of London, and certain Institute of London Underwriters companies filed this action, seeking a declaration of their rights and obligations under five different insurance policies issued to the defendants. See Document #1. Plaintiffs have denied coverage and defense obligations under the policies for claims pending against defendants in Winkler

County, Texas and Dallas County, Texas (collectively, the "Heritage Group claims"). See Document #1, Exhibit C.

In September 1992, before this action was filed, the lawsuit pending in Winkler County proceeded to trial, and the court entered a jury verdict against the defendants in excess of \$100 million. Document #3 at 1-2. After receiving notice of the verdict, plaintiffs filed a declaratory judgment suit identical to the present action on December 9, 1992. Document #3 at 2; Document #5 at 2-3. That suit was dismissed without prejudice pursuant to an agreement of counsel which required defendants to give plaintiffs notice of any intent to commence litigation in the future. Document #3 at 2; Document #5 at 3. Such notice was given on February 23, 1993, and plaintiffs filed this action later that day. *Id.* On March 26, 1993, defendants filed a suit in Travis County, Texas, against the plaintiffs for, among other things, breach of contract and breach of the duty of good faith and fair dealing. *Id.* In the instant motion, defendants seek to dismiss or to stay this action pending the conclusion of the related suit in Travis County.

The district court, in its discretion, may provide declaratory relief. *909 Corp. v. Village of Bolingbrook Police Pension Fund*, 741 F. Supp. 1290, 1292 (S.D. Tex. 1990) (citing *Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599, 601 (5th Cir. 1983)). To determine if declaratory relief is appropriate, the court may consider whether the declaratory judgment action was filed in anticipation of a trial on the same issues in state court. *Rowan Companies, Inc. v. Griffin*, 876 F.2d 26, 29 (5th Cir. 1989) (citing *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491, 494-5 (1942)); *909 Corp.*, 741 F. Supp. at 1292. The court may also

consider whether granting relief will result in piecemeal litigation. *Granite State Ins. Co. v. Tandy Corp.*, 762 F. Supp. 156, 157 (S.D. Tex. 1991), *aff'd*, 959 F.2d 968 (1992) (citations omitted).

The state court lawsuit pending in Travis County encompasses the coverage issues raised by the plaintiffs in this action. The plaintiffs are already parties to that suit and may assert their claims as defenses or counter-claims. Resolving the plaintiffs' claims in this Court, however, would not dispose of the Travis County suit. Further, when the plaintiffs originally filed this suit in December 1992, they did so in anticipation of litigation after receiving notice of the Winkler County verdict. *See 909 Corp.*, 741 F. Supp. at 1292-93 (disallowing forum shopping in the guise of a declaratory judgment action). Thus, the Court finds that exercising jurisdiction to grant declaratory relief would result in the piecemeal adjudication of the plaintiffs' and defendants' coverage dispute and would reward plaintiffs' attempts to forum shop. *See Document #4, Exhibits B, C.* A stay of these proceedings is therefore appropriate.

Based on the foregoing, the Court

ORDERS that defendants' motion to dismiss or to stay (Document #3) is GRANTED IN PART. This action [is] hereby STAYED pending resolution of *Margaret Hunt Hill, et al. v. Leslie Wilton, et al.*, No. 93-03542, currently pending in the 299th Judicial District Court of Travis County, Texas.

SIGNED at Houston, Texas, on this the 30 day of June, 1993.

/s/ David Hittner
DAVID HITTNER
 United States
 District Judge

**UNITED STATES COURT OF APPEALS
 for the Fifth Circuit**

No. 93-2608
 Summary Calendar

LESLIE WILTON, ETC., ET AL.,
 Plaintiffs-Appellants,
 VERSUS
 SEVEN FALLS COMPANY, ET AL.,
 Defendants-Appellees.

Appeal from the United States District Court
 for the Southern District of Texas
 (CA H 93 0531)

[Filed June 29, 1994]

Before GARWOOD, DAVIS, and DUHÉ, Circuit Judges.

DAVIS, Circuit Judge:¹

The plaintiffs appeal the district court's order staying this action for declaratory judgment pending resolution of a later-filed state court suit. Because we find that the

¹ Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

district court did not abuse its discretion in staying this action, we affirm.

I.

In October 1992, a verdict in excess of \$100 million was rendered against the appellees and others in suits involving a dispute over the ownership and operation of certain oil and gas properties. Anticipating litigation based on this verdict, in December 1992, the plaintiffs/appellants (collectively "London Underwriters") filed a declaratory judgment action pursuant to 28 U.S.C. § 2201 in the United States District Court for the Southern District of Texas. The appellants sought declaration of their rights and liabilities under several policies of commercial general liability insurance issued to appellees (collectively the "Hill Group"). Counsel for the parties thereafter entered into an agreement whereby London Underwriters agreed to voluntarily dismiss their declaratory judgment action in exchange for the Hill Group's agreement to provide London Underwriters two weeks['] advance notice prior to commencing any litigation against London Underwriters.

In February 1993, the Hill Group notified London Underwriters of their intention to file suit in state court. London Underwriters immediately filed this declaratory judgment action in the Southern District of Texas. In March 1993, the Hill Group filed an action against London Underwriters in state court. At approximately the same time, the Hill Group also filed a Rule 12(b) motion to dismiss or stay the federal declaratory judgment action. The district court granted the appellees's [sic] Rule

12 motion, staying the declaratory judgment action pending resolution of the state court action. London Underwriters appeal.

II.

The district court has broad discretion to grant (or decline to grant) declaratory judgment. **Torch, Inc. v. LeBlanc**, 947 F.2d 193, 194 (5th Cir. 1991). This court reviews the dismissal of a declaratory judgment action for an abuse of discretion. **Rowan Cos. v. Griffin**, 876 F.2d 26, 29 (5th Cir. 1989).

The district court may consider a variety of factors in considering whether to grant or deny declaratory relief, including the existence of a pending state court proceeding in which the issues might be fully litigated. *Id.*

Fundamentally, the district court should determine whether the state action provides an adequate vehicle for adjudicating the claims of the parties and whether the federal action serves some purpose beyond mere duplication of effort. The district court should consider denying declaratory relief to avoid gratuitous interference with the orderly and comprehensive disposition of a state court litigation if the claims of all parties can satisfactorily be adjudicated in the state court proceeding.

Matter of Magnolia Marine Transp. Co., 964 F.2d 1571, 1581 (5th Cir. 1992) (internal punctuation and citations omitted).

The pending state court action in this case encompasses the coverage issues raised by London Underwriters in this declaratory action. The appellants are parties to the pending state court action and may assert coverage defenses in that suit. The district court did not abuse its discretion in concluding that maintenance of this declaratory judgment action would result in piecemeal adjudication of the coverage dispute and would reward London Underwriters's [sic] attempts to forum shop. Accordingly, the district court's order declining to entertain this declaratory judgment action is affirmed.

AFFIRMED.

JAN 11 1995

In The

Supreme Court of the United States

October Term, 1994

LESLIE WILTON, ON BEHALF OF HIMSELF AND AS A REPRESENTATIVE OF CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON, AND CERTAIN INSTITUTE OF LONDON UNDERWRITERS COMPANIES, AS FOLLOWS, THE

ORION INSURANCE COMPANY, PLC, SKANDIA U.K.

INSURANCE PLC, THE YASUDA FIRE & MARINE INSURANCE COMPANY OF EUROPE, LTD., OCEAN MARINE INSURANCE CO., LTD., YORKSHIRE INSURANCE CO., LTD., MINSTER INSURANCE CO., LTD., PRUDENTIAL ASSURANCE CO., LTD., PEARL ASSURANCE PLC, BISHOPSGATE INSURANCE LTD., HANSA MARINE INS. CO. (UK) LTD., VESTA (UK) INS. CO., LTD., NORTHERN ASSURANCE CO., LTD., CORNHILL INSURANCE CO., LTD., SIRIUS INSURANCE CO., (UK) LTD., SOVEREIGN MARINE & GENERAL INSURANCE CO., TOKIO MARINE & FIRE INSURANCE (UK) LTD., TAISHO MARINE & FIRE INSURANCE CO. (UK) LTD., STOREBRAND INSURANCE CO. (UK) LTD., ATLANTIC MUTUAL INSURANCE CO., ALLIANZ INTERNATIONAL INSURANCE CO., LTD., AND WAUSAU INSURANCE CO. (UK) LTD.,

versus *Petitioners,*

SEVEN FALLS COMPANY, MARGARET HUNT HILL, ESTATE OF A. G. HILL, LYDA HILL, ALINDA H. WIKERT, AND U.S. FINANCIAL CORP.,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

- I. In reviewing a decision by a district court to abstain from exercising diversity jurisdiction in a declaratory judgment action, should the court of appeals determine the abstention issue *de novo*?
- II. May a federal district court with diversity jurisdiction over a declaratory judgment action abstain from exercising that jurisdiction in light of a later-filed action in a state court, ignoring the unflagging obligation to exercise jurisdiction and without considering the exceptional circumstances factors of *Colorado River* and *Moses H. Cone*?
- III. Because a searching review of the *Colorado River-Moses H. Cone* factors reveals no exceptional circumstances, did the district court and the court of appeals err in allowing the stay, considering the virtually unflagging obligation to exercise jurisdiction?

LIST OF PARTIES

All Petitioners named in the caption of this case were parties plaintiff to the proceedings below and constitute all those that have a direct interest in the judgment sought to be reviewed; Petitioners' corporate parents and nonwholly owned subsidiaries include:

1. ING Group NV (Netherlands), ultimate parent of The Orion Insurance Company, PLC;
2. Skandia Group (Sweden), ultimate parent of Skandia U.K. Insurance PLC;
3. Yasuda (Japan), ultimate parent of The Yasuda Fire & Marine Insurance Company of Europe, Ltd.;
4. Commercial Union PLC, ultimate parent of Ocean Marine Insurance Co., Ltd.;
5. General Accident PLC, ultimate parent of Yorkshire Insurance Co., Ltd.;
6. Societe Centrale du Groupe des Assurances Nationales, ultimate parent of Minster Insurance Co., Ltd.;
7. Prudential Corporation PLC, ultimate parent of Prudential Assurance Co., Ltd.;
8. Australian Mutual Provident Society, ultimate parent of Pearl Assurance PLC;
9. AMEV (Netherlands), ultimate parent of Bishopsgate Insurance Ltd.;
10. Trygg Hansa SSP Holding (Sweden), ultimate parent of Hansa Marine Ins. Co. (UK) Ltd.;

LIST OF PARTIES – Continued

11. Skandia Group (Sweden), ultimate parent of Vesta (UK) Ins. Co., Ltd.;
12. Commercial Union PLC, ultimate parent of Northern Assurance Co., Ltd.;
13. Allianz AG Holding (Germany), ultimate parent of Cornhill Insurance Co., Ltd.;
14. ASEA Brown Boveri (Switzerland), ultimate parent of Sirius Insurance Co., (UK) Ltd.;
15. Willis Corroon PLC, ultimate parent of Sovereign Marine & General Insurance Co.;
16. Tokio Marine & Fire Insurance Co., Ltd. (Japan), ultimate parent of Tokio Marine & Fire Insurance (UK) Ltd.;
17. Mitsui Marine & Fire Insurance Co., Ltd. (Japan), ultimate parent of Taisho Marine & Fire Insurance Co. (UK) Ltd.;
18. UNI Storebrand (Norway), ultimate parent of Storebrand Insurance Co. (UK) Ltd.;
19. Atlantic Mutual Insurance Co. of New York, ultimate parent of Atlantic Mutual Insurance Co.;
20. Allianz AG Holding (Germany), ultimate parent of Allianz International Insurance Co., Ltd.;
21. Employers Insurance of Wausau (U.S.A.), ultimate parent of Wausau Insurance Co. (UK) Ltd.;

LIST OF PARTIES – Continued

22. London & Overseas Insurance Co. PLC, a subsidiary of The Orion Insurance Company, PLC;
23. Contingency Insurance Company, Ltd., a subsidiary of Minster Insurance Co., Ltd.;
24. GAN North America Inc., an associated company of Minster Insurance Co., Ltd.;
25. Prudential Life of Ireland Ltd., a subsidiary of Prudential Assurance Co., Ltd.;
26. Prudential Vita SPA (Italy), a subsidiary of Prudential Assurance Co., Ltd.;
27. Hallmark Insurance Company Ltd., a subsidiary of Pearl Assurance PLC;
28. Leadenhall Insurance Ltd., a subsidiary of Bishopsgate Insurance Ltd.;
29. Hansa General Insurance Co. (UK) Ltd., a subsidiary of Hansa Marine Ins. Co. (UK) Ltd.;
30. Allianz Cornhill Insurance (Far East) Ltd. (Hong Kong) a subsidiary of Cornhill Insurance PLC;
31. Holding Cornhill France SA, a subsidiary of Cornhill Insurance PLC;
32. Cornhill France SA, a subsidiary of Cornhill Insurance PLC;
33. Themis SA (France), a subsidiary of Cornhill Insurance PLC;
34. Sovereign Insurance (UK) Ltd., a subsidiary of Sovereign Marine & General Insurance Co.; and

LIST OF PARTIES – Continued

35. Norden Insurance Co. (UK) Ltd., a subsidiary of Storebrand Insurance Co. (UK) Ltd.

Petitioners' Counsel:

MEYER ORLANDO & EVANS_{PC}

Michael A. Orlando
Patrick C. Appel
Paul LeRoy Crist

Respondents named in the caption of this case were the remaining parties to the proceedings below and so constitute the other individuals and entities that have a direct interest in the judgment sought to be reviewed; Respondents' Counsel below were:

HAYNES & BOONE

Werner A. Powers
Charles C. Keeble, Jr.

The parallel litigation subsequently filed by Respondents, *inter alia*, in Texas state court, after amendment, involves the following parties:

1. Sherman Hunt;
2. Stuart Hunt;
3. Hara Hunt;
4. Hilre Hunt;
5. Texana Resources Corporation;
6. Silco, Inc.;

LIST OF PARTIES – Continued

7. Headwaters Oil Company;
8. Tribal Drilling Company;
9. Chester J. Donnally, Trustee of the Margaret Hunt Hill-A.G. Hill Trust, the Elisa Margaret Hill Trust, the Heather Victoria Hill Trust, the Cody McArthur Wikert Trust, the Margretta Hill Wikert Trust, the Michael Bush Wisenbaker, Jr. Trust, and the Wesley Hill Wisenbaker Trust;
10. Planet Indemnity Company; and
11. Underwriters Indemnity Company.

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In The
Supreme Court of the United States
October Term, 1994

LESLIE WILTON, ON BEHALF OF HIMSELF AND AS A
REPRESENTATIVE OF CERTAIN UNDERWRITERS AT
LLOYD'S OF LONDON, AND CERTAIN INSTITUTE OF
LONDON UNDERWRITERS COMPANIES, AS FOLLOWS, THE
ORION INSURANCE COMPANY, PLC, SKANDIA U.K.
INSURANCE PLC, THE YASUDA FIRE & MARINE
INSURANCE COMPANY OF EUROPE, LTD., OCEAN
MARINE INSURANCE CO., LTD., YORKSHIRE INSURANCE
CO., LTD., MINSTER INSURANCE CO., LTD., PRUDENTIAL
ASSURANCE CO., LTD., PEARL ASSURANCE PLC,
BISHOPSGATE INSURANCE LTD., HANSA MARINE INS. CO.
(UK) LTD., VESTA (UK) INS. CO., LTD., NORTHERN
ASSURANCE CO., LTD., CORNHILL INSURANCE CO., LTD.,
SIRIUS INSURANCE CO., (UK) LTD., SOVEREIGN MARINE &
GENERAL INSURANCE CO., TOKIO MARINE & FIRE
INSURANCE (UK) LTD., TAISHO MARINE & FIRE
INSURANCE CO. (UK) LTD., STOREBRAND INSURANCE CO.
(UK) LTD., ATLANTIC MUTUAL INSURANCE CO., ALLIANZ
INTERNATIONAL INSURANCE CO., LTD., AND WAUSAU
INSURANCE CO. (UK) LTD.,

versus *Petitioners,*

SEVEN FALLS COMPANY, MARGARET HUNT HILL,
ESTATE OF A. G. HILL, LYDA HILL,
ALINDA H. WIKERT, AND U.S. FINANCIAL CORP.,

Respondents.

**On Writ Of Certiorari To The United States
Court Of Appeals For The Fifth Circuit**

BRIEF FOR PETITIONERS

Petitioners respectfully pray that the Court will reverse the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on June 29, 1994, and remand the cause to the District Court for the Southern District of Texas, Houston Division for further proceedings on the merits.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit was not originally reported, and is reprinted at J.A. 27-30. It is now available electronically as 1994 WL 705045 on Westlaw.

The opinion of the District Court for the Southern District of Texas is not reported, and is reprinted at J.A. 23-26.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254. The decision of the Court of Appeals for the Fifth Circuit was rendered on June 29, 1994. A petition for a writ of certiorari was timely filed on September 26, 1994; this Court granted certiorari on November 28, 1994.

This case was originally filed in the United States District Court for the Southern District of Texas. Diversity jurisdiction, 28 U.S.C. § 1332, was asserted and relief was sought under the Declaratory Judgment Act, 28 U.S.C. § 2201(a). This case was appealed to the United States

Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1291.

STATUTE INVOLVED

28 U.S.C. § 2201(a). Declaratory Judgment Act.

In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT OF THE CASE

This appeal arises out of an insurance coverage dispute between various oil and gas interests, including Seven Falls Company, Margaret Hunt Hill, Estate of A. G. Hill, Lyda Hill, Alinda H. Wikert, and U. S. Financial Corporation ("the Hills" or "Respondents"), and their insurers, including Petitioners Leslie Wilton, on behalf of himself and as representative of certain Underwriters at Lloyd's of London, and certain member companies of the Institute of London Underwriters ("Underwriters" or "Petitioners"). The subject of the dispute is a judgment of the Winkler County, Texas court against the Hills for \$110 million, for which they seek coverage under Underwriters' policies. RII 18; RI 262.

On July 31, 1992, Underwriters declined to defend the Hills against claims being asserted in two nearly identical lawsuits pending in Texas courts, because the policies in question provided no coverage.¹ One of these underlying suits proceeded to trial in September 1992; in November 1992 the jury returned a verdict against the Hills, *inter alia*, in excess of \$110 million on claims of breach of contract, tortious interference with contract, and slander of title. On November 24, 1992, the Hills advised Underwriters of the adverse jury verdict by a one-sentence letter.² No demand for coverage was made at that time and no lawsuit was threatened by the Hills.

Having declined defense and coverage five months earlier and believing there to be a lingering question as to whether their policies provided coverage, Underwriters filed suit in the United States District Court for the Southern District of Texas on December 9, 1992.³ Basing jurisdiction upon diversity of citizenship under 28 U.S.C. § 1332, Underwriters sought a declaration that their policies did not cover the Hills' liabilities from the Winkler County judgment.

In December 1992, the Hills requested that Underwriters dismiss their declaratory judgment action. The Hills represented to Underwriters that other insurers were the target of their coverage claims and that the Hills contemplated no suit against Underwriters.⁴

Hoping to resolve the coverage dispute amicably, without the need for judicial intervention, Underwriters voluntarily dismissed their action on January 22, 1993. Underwriters did so, however, only upon the Hills' agreement to give two weeks' notice if ever the Hills changed their position and decided to assert claims against Underwriters.

On February 23, 1993, the Hills notified Underwriters of their intention to file suit in Travis County (Austin, Texas). Accordingly, Underwriters promptly refiled their declaratory judgment action on February 24, 1993. J.A. 4 & 24.

The Hills sued other insurers in state court in Dallas County, Texas on February 24, 1993.⁵ However, not until March 26, 1993 did the Hills initiate an action against Underwriters.⁶ Suit was filed in Travis County over a

and indeed before they ever made claims against any of these Underwriters, the Hills were engaged in an active controversy with other insurers. RI 193-98, 205 ¶ 3, 225; RII 139-144, 150 ¶ 3; and RII 268 Transcript p. 19.

⁵ Suit was filed by Margaret Hunt Hill, et al., against Ronald Malcolm Pateman, certain other Underwriters at Lloyd's of London and other insurance companies on February 24, 1993, in the 298th Judicial District Court, Dallas County, Texas; none of Petitioners' policies are involved in the Dallas County action. RI 152-183, 204 ¶ 7.

⁶ Cause No. 93-03542, styled *Margaret Hunt Hill, et al. v. Leslie Wilton, et al.*, in the 299th Judicial District, Travis County, Texas, has been by agreement of the parties transferred as Cause No. 93-58208, to the 133rd Judicial District Court, Harris County (Houston, Texas). This state court action seeks actual damages of \$110 million, plus exemplary and punitive damages of at least \$330 million. RII 122-24 ¶¶ 45-51.

¹ RI 185-88, 204 ¶ 6; RII 268 Transcript p. 3.

² RI 193-95, 205 ¶ 2; RII 53-58, 145-47, 150 ¶ 2.

³ J.A. 24; RI 5, 225.

⁴ Long before the Hills filed any suit against Petitioners,

month after Underwriters' present declaratory judgment action was filed and almost four months after the initial declaratory judgment action of December 9, 1992.⁷ In order to prevent removal, and in a transparent attempt to make the parallel state court suit non-identical to Underwriters' declaratory judgment action, the Hills misjoined in their later Travis County suit wholly unrelated causes of action by the Winkler County co-defendants against those parties' own insurers. None of the additional plaintiffs is an insured of Underwriters; neither of the two insurers for those other parties has any relationship with any of the Hills.⁸

With the filing of their Travis County action, the Hills moved to dismiss or stay this declaratory judgment action.⁹ When Underwriters responded to that motion, no action had been taken in the Travis County case beyond the Hills' filing of their original petition. J.A. 4-5. Underwriters had not yet been served with citation.¹⁰ Underwriters' answer in the later-filed suit was made just weeks before this action was stayed.¹¹

⁷ RII 120-137, 150 ¶ 5.

⁸ Also named as defendants in the later-filed proceeding were the insurers for the Hunt parties, i.e., Planet Indemnity Company and Underwriters Indemnity Company, the latter of which is alleged to be a Texas corporation with its principal place of business in Harris County, Texas. RII 127-29 ¶ 32, ¶¶ 36-37, & 136.

⁹ J.A. 15-22; RI 261-63.

¹⁰ RI 212-13.

¹¹ J.A. 6; RI 213.

Based upon this later-filed state court action in a county of clearly improper venue (as the Hills belatedly concede), the United States District Court for the Southern District of Texas granted the Hills' motion and ordered this litigation stayed, pending the resolution by the state court of the Hills' later-filed action. J.A. 5-6, 23-26. The district court's decision to abstain recites three principal factors, namely, the possibility of piecemeal litigation, forum shopping, and a "race" to the courthouse by filing suit in anticipation of expected litigation. J.A. 25. In doing so, the district court did not apply the abstention factors this Court mandated in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) and *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983).

On appeal, the Court of Appeals for the Fifth Circuit reviewed the district court's decision solely for abuse of discretion, and affirmed. As interpreted by the court of appeals, the "exceptional circumstances" test required by this Court in all other abstention cases is unnecessary in decisions under the Declaratory Judgment Act. J.A. 29 & 30; RII 270-71. In doing so, the court of appeals implicitly relied upon its decision in *Granite State Ins. Co. v. Tandy Corp.*, 986 F.2d 94, 97 (CA5), cert. granted, ___ U.S. ___ 113 S.Ct. 51, 121 L.Ed. 2d 21 (1992), cert. dismissed, ___ U.S. ___ 113 S.Ct. 1836, 123 L.Ed. 2d 463 (1993), wherein the Fifth Circuit specifically rejected the application of *Colorado River* and *Moses H. Cone* under a misperception of the breadth of discretion to decline to grant declaratory relief under *Brillhart v. Excess Insurance Co.*, 316 U.S. 491 (1942).



SUMMARY OF ARGUMENT

In affirming with little factual recitation, let alone a searching review, the Fifth Circuit deviated from established practice in at least seven other circuits in its deference to the district court's discretion. The Fifth Circuit is the only court of appeals which expressly has declared that a standardless decision to dismiss or stay an action for declaratory relief will be reviewed only for the district court's abuse of discretion. The Fifth Circuit has left litigants with no meaningful protection against the whim or personal disinclination of a district court.

Because an abstention decision impacts such delicate concerns as comity and the importance of federal jurisdiction, Underwriters believe the "legal" decision to abstain is reviewable *de novo*. A district court's decision to dismiss or stay a declaratory judgment action deserves *de novo* review, and the *Colorado River*-*Moses H. Cone* factors should be applied in that decision. In this case, the district court's substantially standardless and nearly unreviewable discretion to stay undermines the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River*, 424 U.S. at 817.

The importance of these issues extends well beyond the facts of this dispute, for the outcome here will affect the abstention doctrine broadly. A decision to abstain, except in the most extraordinary circumstances, thwarts the legislative purpose behind the jurisdictional statutes and the Declaratory Judgment Act. Declaratory judgment abstention is no different from any other type of abstention previously addressed by this Court. The analysis and

factors from *Colorado River* and *Moses H. Cone* are a template to be superimposed on *Brillhart* to provide district courts with guidance in determining whether to abstain.

The court below denied Underwriters both their right to be in a federal court, and the declaratory remedy which Congress affirmatively supplied. The only basis for this abrogation of statutory redress, infringement on legislative intent and violation of the separation of powers between the legislature and the judiciary was the court's belief that a later-filed action in another forum would likely provide Underwriters adequate opportunity to present their coverage issues. Because the state court had concurrent jurisdiction and equal competence to resolve the issues presented, the district court stayed this case and thereby rewarded the Hills' selection of an acknowledged improper venue, transparent misjoinder of parties, and inequitable abuse of Underwriters' willingness to compromise their first declaratory judgment action.

The district court essentially presumed it was appropriate to decline properly invoked jurisdiction whenever a parallel suit exists. Especially where the state court proceeding is filed after the federal declaratory judgment action – as in this case – such a *de facto* presumption runs directly counter to the principle that abstention is to be "the exception, not the rule." *Colorado River*, 424 U.S. at 812-13. Underwriters reject outright the Hills' proposition that it must be presumed that a parallel state court action, whenever filed, enjoys a preference over a declaratory judgment action. A presumption, or primary emphasis placed on certain factors to the exclusion of others, is contrary to the "informed" discretion that this Court has said should be governed by case-specific facts, weighing

each as merited by the circumstances and "with the balance heavily weighted in favor of the exercise of jurisdiction." *Moses H. Cone*, 460 U.S. at 17. The "virtually unflagging obligation" to exercise jurisdiction, tempered by the exceptional circumstances identified by *Colorado River* and *Moses H. Cone*, can not be lightly cast aside.

Applying the six *Colorado River*-*Moses H. Cone* factors to the district court's failure to exercise jurisdiction below, Underwriters are confident that the facts demonstrate their entitlement to go forward with their declaratory judgment action. As a matter of law, two of the three findings to support the stay of this action were clearly erroneous. The lack of forum shopping by Underwriters has been conceded by the Hills. The finding that Underwriters acted in anticipation of the Hills themselves filing suit, is also wrong, because even after commencement of Underwriters' December 1992 action, the Hills disavowed any intent to litigate coverage with Underwriters. Underwriters' first declaratory judgment action, brought four months before the state court suit was filed, was initiated without any threat or even suggestion that the Hills intended to file their own suit.

The final fact found by the court below was that piecemeal adjudication of the parties' dispute would be encouraged by this declaratory judgment action going forward. As a practical matter, however, this case involves just the kind of discrete insurance coverage issue Congress intended to be the subject of proactive litigation separate from a liability suit or other parallel claim that ostensibly would encompass the insurers' issues. Accurate focus on the specter of piecemeal litigation, additionally, reveals it is the Hills' own choice. Their filing of

multiple suits establishes that piecemeal litigation is a result of their, rather than Underwriters', actions. Hence, the finding that this action had to be stayed for fear of piecemeal adjudication is also clearly erroneous on the record presented. The Court should exercise its independent judgment on the record, and determine that exceptional circumstances justifying abstention did not exist in this case.

ARGUMENT

I. In conflict with other circuits, the Fifth Circuit reviews a district court's decision to stay deferentially for an abuse of discretion, rather than *de novo*.

In writing the recent *Mhoon* decision while sitting by designation with the Tenth Circuit, Associate Justice White, Retired, declined to address the "simmering circuit split" on the appropriate standard of review of the decision to stay or dismiss a declaratory judgment action, but seemed to acknowledge that differing outcomes in a particular case would hinge on the level of scrutiny the appellate court applied to the decision to abstain. *State Farm Fire & Cas. Co. v. Mhoon*, 31 F.3d 979, 983 & n. 6 (CA10 1994). The Fifth Circuit "reviews the dismissal of a declaratory judgment action for an abuse of discretion," and so errs in giving almost total deference to the decision to abstain in a declaratory judgment action, rather than the *de novo* review this critical determination deserves. J.A. 29; RII 270; 1994 WL 705045. In doing so, the Fifth Circuit is in accord with the highly deferential review accorded by the First, the Second, the Seventh, the

Eighth and the Tenth Circuits, and in conflict with the *de novo*, "plenary" or otherwise heightened scrutiny conducted by the Third, the Fourth, the Sixth, the Ninth, the Eleventh, the Federal, and the District of Columbia Circuits.¹²

Application of any justiciability or abstention doctrine should be a question of law to be reviewed *de novo*, because of the comity and federalism concerns that are raised. Traditionally, review of ripeness, standing and other jurisprudential issues is plenary. See *Abbott Lab. v. Gardner*, 387 U.S. 136, 152-53 (1967); *Altvater v. Freeman*, 319 U.S. 359, 365-66 & n.6 (1943).¹³ The judiciary enforces those rules and regulations enacted by the legislature within the limits of the Constitution and pursuant to the jurisdiction authorized by Article III and conferred by congressional grant. Any doctrine which allows abstention from those legislative mandates requires searching appellate review to assure that litigants are not deprived

¹² Compare *Mhoon*, 31 F.3d at 983 and *A.G. Edwards & Sons, Inc. v. Public Bldg. Comm'n.*, 921 F.2d 118, 121 & n.3 (CA7 1990) with *Jackson v. Culinary School of Washington, Ltd.*, 27 F.3d 573, 579 (CA DC 1994), petition for cert. filed, 63 U.S.L.W. 3423 (U.S. Nov. 15, 1994) (No. 94-886) and *Charter Fed. Sav. Bank v. Office of Thrift Supervision*, 976 F.2d 203, 208 (CA4 1992), cert. denied, ___ U.S. ___, 113 S.Ct. 1643, 123 L.Ed. 2d 265 (1993).

¹³ Commentators have approached consensus that there should be *de novo* review of threshold decisions on jurisdiction. See 10A Charles A. Wright, Arthur R. Miller & Mary K. Kane, **FEDERAL PRACTICE AND PROCEDURE**, § 2759 n.22 (Supp. 1993 to 2d. ed. 1983); 6A James W. Moore, et al., **MOORE'S FEDERAL PRACTICE** ¶ 57.08[2] at 36-37 & nn.5-8 (Supp. 1992 to 2d ed. 1982); Henry J. Friendly, *Indiscretion About Discretion*, 31 **EMORY L.J.** 747, 778-79 (1982); Edwin Borchard, **DECLARATORY JUDGMENTS** at 294 (2d ed. 1941).

of their forum and remedy absent the strongest countervailing state interests to justify a federal court's deference to a parallel proceeding. While avoidance of duplicative litigation, the concomitant waste of either court's resources, and simple wise judicial administration are important criteria guiding the exercise of federal jurisdiction, nothing in the Declaratory Judgment Act nor the diversity statute authorizes abdication of the appellate responsibility to see that "such discretion [is] exercised under the relevant standard prescribed by this Court." *Moses H. Cone*, 460 U.S. at 19.

Additionally, *de novo* review is customarily applied to appeals of injunctions, arbitration orders, and declaratory judgments when they are issued on the merits, though each form of equitable relief is vested in the "discretion" of the trial court. Like injunctive relief, the hybrid procedure for a declaration of rights is largely an equitable concern. *Eccles v. Peoples Bank of Lakewood Village*, 333 U.S. 426, 431 (1948); *Meredith v. Winter Haven*, 320 U.S. 228, 231 (1943). As the district court's equitable discretion to deny or grant an injunction is reviewed searchingly with respect to the facts and *de novo* on the ultimate conclusion, the similar declaratory remedy requires like treatment. *Winter Haven*, 320 U.S. at 235-36. There is some confusion whether a denial of declaratory relief after full trial is an original matter for the reviewing court, but the better line of authority is that there is heightened scrutiny of the decision not to grant relief. *Public Affairs Assocs. v. Rickover*, 369 U.S. 111, 112-13 (1962).

Because declining to hear a properly filed declaratory judgment action is no different from any other type of justiciability or abstention consideration for the efficient

administration of the courts, foreclosing the availability of a federal forum without appropriate appellate review makes “a mockery of the rule that only exceptional circumstances justify a federal court’s refusal to decide a case in deference to the States.” *New Orleans Pub. Serv., Inc. v. New Orleans*, 491 U.S. 350, 368 (1989). *De novo* review is required of such fundamental issues on the viability of federal jurisdiction. An abuse-of-discretion or deferential intermediate standard of review is tantamount to no review of the abstention decision. The jurisdictional decision to abstain is a question of law appropriate for *de novo* review.

II. Adherence to this Court’s commands regarding abstention, effectuation of Congress’ intent, and other policy considerations of federalism and comity, require the *Colorado River*-*Moses H. Cone* presumption of jurisdiction to apply absent exceptional circumstances.

Even without the Fifth Circuit’s abuse-of-discretion review, unfettered discretion seriously prejudices declaratory judgment plaintiffs’ right to request a statutory remedy under standardized considerations “informed by the teachings and experience concerning the functions and extent of federal judicial power.” *Public Serv. Comm’n v. Wycoff Co.*, 344 U.S. 237, 243 (1952). Absent application of a uniform standard, only decisions to stay or dismiss based on bias or capriciousness are reviewable for abuses of discretion; under the existing Fifth Circuit standard, docket congestion or mere personal disinclination

not amounting to arbitrary conduct is unreviewable, rendering the statutory declaratory judgment remedy no remedy at all.

The Court is accordingly asked to restore the efficacy of the declaratory judgment action. While exceptional circumstances might constitutionally justify abdication of the unflagging obligation to exercise jurisdiction, the judiciary may not eviscerate an affirmative remedy solely because it is more convenient to do so.¹⁴ Virtually untrammeled discretion to abstain from providing out-of-state and foreign entities declaratory relief simply because the local claimants later sue in state court is contrary to both the diversity statute and the clear congressional mandate in the declaratory remedy. Nothing less than the continued viability of the Declaratory Judgment Act is at stake.

The well-established and universally understood factors delineated in *Colorado River* and *Moses H. Cone* must apply to a district court’s decision to decline the exercise of jurisdiction under the Declaratory Judgment Act. But under current circuit authority, “a district court’s discretionary, nonmerits based dismissal of a declaratory judgment action cannot be successfully challenged merely because it does not satisfy *Colorado River* abstention.”¹⁵

¹⁴ See *Thermtron Prods. v. Hermansdorfer*, 423 U.S. 336, 344-45 (1976) (“But an otherwise properly removed action may no more be remanded because the district court considers itself too busy to try it than an action properly filed in the federal court in the first instance may be dismissed or referred to state courts for such reason.”).

¹⁵ *St. Paul Ins. Co. v. Trejo*, 39 F.3d 585, 591 & nn. 8 & 10 (CA5 1994); accord *Continental Cas. Co. v. Robsac Indus.*, 947 F.2d 1367,

This case is stayed only because of the Fifth Circuit's use of a scheme contrary to the decisions of its sister circuits and this Court.

The Fifth Circuit law is in direct conflict with the mandatory application of the *Colorado River-Moses H. Cone* factors required by the First, the Second, the Eighth, and the Eleventh Circuits.¹⁶ In addition to the four courts of appeals which have expressly held the *Colorado River-Moses H. Cone* factors to govern declaratory judgment abstention and effectively to limit the district court's unbridled discretion under *Brillhart*, another six circuits have ruled that this Court's traditional abstention analysis governs at least some declaratory judgment contexts or that some elements of this Court's test should be considered in deciding to dismiss or stay a properly filed declaratory judgment action.¹⁷

1372-73 (CA9 1991). Though there is now a six-factor Fifth Circuit test for abstention from a declaratory judgment action in consideration of a parallel state court suit, there is no presumption of jurisdiction and the test omits jurisdiction over real property, precedence of filing, conflict of laws or application of federal law. *Travelers Ins. Co. v. Louisiana Farm Bureau Federation, Inc.*, 996 F.2d 774, 778-79 (CA5 1993).

¹⁶ *Employers Ins. of Wausau v. Missouri Elec. Works, Inc.*, 23 F.3d 1372, 1374-75 (CA8 1994); *Villa Marina Yacht Sales, Inc. v. Hatteras Yachts*, 915 F.2d 7, 16 (CA1 1990); *General Reinsurance Corp. v. Ciba-Geigy Corp.*, 853 F.2d 78, 81 (CA2 1988); *American Mfrs. Mut. Ins. Co. v. Edward D. Stone, Jr. & Assocs.*, 743 F.2d 1519, 1525 (CA11 1984).

¹⁷ *Genentech, Inc. v. Eli Lilly & Co.*, 998 F.2d 931, 938, 949 (CTAF 1993); *Mitcheson v. Harris*, 935 F.2d 235, 239-40 & n.2 (CA4 1992); *University of Maryland v. Peat Marwick Main & Co.*, 923 F.2d 265, 271 (CA3 1991) (Burford abstention discussing *Moses H. Cone* and *Colorado River*); *Life-Link Intern., Inc. v. Lalla*, 902 F.2d

The Hills ask this Court to ignore fifty years' intervening development in the abstention doctrine and confirm the Fifth Circuit's and the Ninth Circuit's misreading of *Brillhart* discretion. *Brillhart*, 316 U.S. at 495. Neither *Brillhart* nor any other source supports the Hills' argument that a later-filed state court suit is alone a proper basis on which to exercise the discretion to decline to entertain an otherwise appropriate declaratory judgment action. J.A. 18-20; RII 113-16. *Brillhart* itself suggested several fact-specific considerations the court on remand should weigh in deciding to dismiss or stay the federal action in favor of the state court case. Indeed, *Brillhart* remanded to the district court "in order that it may properly exercise its discretion in passing upon the petitioner's motion to dismiss this suit." *Id.* at 498.

To support their position, the Hills invoke the authority of Professor Edwin Borchard for their argument that the "obligation to decide virtually all questions within its jurisdiction is curtailed when complainants seek declaratory relief," Brief in Opposition 10; but the law review they reference, without page citation, actually argues:

But the [district] court's discretion is *not* properly used when the declaratory action is dismissed . . . because the court erroneously assumes . . . that the court lacks "jurisdiction" merely because a state action for negligence is pending; or for other errors in law. There is no "discretion" to refuse to assume jurisdiction over a case which is properly before the court

1493, 1495 (CA10 1990); *Heitmanis v. Austin*, 899 F.2d 521, 527 (CA6 1990); *Hanes Corp. v. Millard*, 531 F.2d 585, 591 (CA DC 1976).

and which is entirely appropriate for declaratory adjudication.

Edwin Borchard, *Discretion to Refuse Jurisdiction of Actions for Declaratory Judgments*, 26 MINN. L. REV. 677, 684-85 (1942) (original emphasis; citations omitted).

Professor Borchard also wrote at a time before this Court's abstention pronouncements gave the district courts guidance as to "the propriety or impropriety of using the discretion to assume or refuse jurisdiction." *Ibid.* at 682. He urged an "effort to classify facts, and in such cases it is not improper to suggest that discretion has hardened into rule" which should govern the decision to hear a declaratory judgment action on analogous facts. *Ibid.* at 682-83. Moreover, Professor Borchard's article, arguably, advocates an exceptional-circumstances test itself. While the examples he gives in no way foreshadowed the *Colorado River-Moses H. Cone* factors, he clearly presaged the jurisprudential framework this Court has since delineated. *Ibid.* at 694-95.

The absence of a uniform test restraining a district court's unfettered discretion to decline its jurisdiction is "treason to the Constitution." *New Orleans Pub. Serv., Inc.*, 491 U.S. at 358. Abstention can be acceptable only after "a careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction." *Moses H. Cone*, 460 U.S. at 16. The importance of both federalism and comity concerns require that district courts faced with declaratory judgment actions engage in a "carefully considered" analysis of the factors set out by this Court in *Colorado River*, 424 U.S. at 818, and *Moses H. Cone*, 460 U.S. at 26, 28.

The congressional purpose behind the Declaratory Judgment Act supports application of the *Colorado River-Moses H. Cone* analysis. Congress may not have addressed the precise question, but the legislative history indicates an attitude adverse to the Hills' argument. Congress was aware of the social utility and particularized beneficial purpose for litigants when it enacted 28 U.S.C. § 2201, even recognizing the increase in federal court caseload that might occur.¹⁸ The legislative intent and purpose of the Declaratory Judgment Act are clear: Parties to private disputes should be able to avail themselves of the § 2201 mechanism and obtain, where appropriate, a declaration of their rights and responsibilities from a neutral forum. H.R. Rep. No. 627, 72d Cong., 1st Sess., at 2 (1932); H.R. Rep. No. 1264, 73d Cong., 2d Sess., at 2 (1934).

¹⁸ District judges' opposition to the legislation advanced by Professor Borchard and his Congressional sponsors centered on the new remedy's potential to burden the federal courts with new cases involving only state law; Congress considered objections on the basis of judicial economy – and flatly rejected them in favor of larger national and international objectives that merited opening the doors of the federal courts to that increased case load. Donald L. Doernberg & Michael B. Mushlin, *The Trojan Horse: How the Declaratory Judgment Act Created a Cause of Action and Expanded Federal Jurisdiction While the Supreme Court Wasn't Looking*, 36 UCLA L. REV. 529, 565-68 & n.174 (1989) (quoting Hearings on H.R. 5623 Before a Subcomm. of the Senate Comm. on the Judiciary, 70th Cong., 1st Sess., at 2-9, 46 (1928); S. Rep. No. 1005, 73d Cong., 2d Sess., at 3 (1934)). See also Hearings on H.R. 10143 Before the House Comm. on the Judiciary, 67th Cong., 2d Sess., at 15 (1922) (Remarks of Representative Earl C. Michener of Michigan concerning "many, many more cases which would not be brought before the courts if the opportunity were not given").

Congress' intent was to create a procedural vehicle open to all those presenting a jurisdictional basis and a beneficial purpose to be served by the declaration sought. All litigants have a right to maintain a suit under the Declaratory Judgment Act to secure a judgment determining the obligations and liabilities of the parties. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 243-44 (1937).¹⁹ Deference to a later-filed state court action, simply because another forum is available, is inconsistent with the affirmative, remedial character of the right to a federal forum granted by Congress. Congress could not have intended for the Declaratory Judgment Act to be a mere invitation for the federal defendant to file a state court suit.

The equitable discretion to grant or deny the relief sought is wholly separate from the jurisdictional decision whether to abstain. While the Declaratory Judgment Act can not be used absent affirmative federal jurisdiction,

¹⁹ The importance of the remedy Congress enacted sixty years ago is emphasized by the fact that some states still have no declaratory judgment procedure or have only recently enacted that kind of procedure. Still others have procedural impediments. See *Cincinnati Ins. Co. v. Holbrook*, 867 F.2d 1330, 1333 (CA11 1989). Oklahoma even affirmatively denies insurers a declaratory judgment action to determine defense and coverage obligations, though every other class of litigant can avail itself of this beneficial procedure. Okla. Stat. tit. 12, § 1651. In each of these instances, the federal remedy under § 2201 is such an affirmative right that its denial is fundamental prejudice to the party invoking it, and can be justified only in exceptional circumstances. *Horace Mann Ins. Co. v. Johnson*, 953 F.2d 575, 577-79 (CA10 1991); *Farmers Alliance Mut. Ins. Co. v. Jones*, 570 F.2d 1384, 1386 (CA10), cert. denied, 439 U.S. 826 (1978).

where jurisdiction exists, the affirmative remedial purpose of the Act can not be denied. *Brillhart* itself refers to the federal courts' equitable factfinding obligations, distinct from their determination of "legal issues governing the proper exercise of their jurisdiction." *Brillhart*, 316 U.S. at 497-98 (emphasis added).

In *Moses H. Cone*, this Court described the anomalous nature of the Federal Arbitration Act, which, while not creating independent federal-question jurisdiction, nonetheless represents an important federal policy "to be vindicated by the federal courts where otherwise appropriate." *Moses H. Cone*, 460 U.S. at 25 n.32. Similarly, nothing in the Declaratory Judgment Act, nor the diversity statute, authorizes unfettered abdication of the "virtually unflagging" jurisdictional obligation, nor refutes that "such discretion must be exercised under the relevant standard prescribed by this Court." *Id.* at 19. Equally with the removal statute, nowhere in the legislative history of the Declaratory Judgment Act "did Congress express any concern about diversity actions filed by insurance carriers."²⁰

²⁰ *Northbrook National Ins. Co. v. Brewer*, 493 U.S. 6, 11-12 (1989) (although it is "somewhat anomalous for Congress to retain original diversity jurisdiction over actions by out-of-state insurers while withdrawing removal jurisdiction," the legislative mandate can neither be restricted nor broadened by the judiciary because of such incongruity). See *Hearings on H.R. 5623 Before a Subcomm. of the Senate Comm. on the Judiciary*, 70th Cong., 1st Sess., at 47-59 (1928) (listing likely declaratory judgment topics, none but two of which would in most cases raise questions of federal law).

District courts *must* hear declaratory judgment cases absent exceptional circumstances; district courts *may* decline to enter the requested relief following a full trial on the merits, if no beneficial purpose is thereby served or if equity otherwise counsels.²¹ See S. Rep. No. 1005, 73d Cong., 2d Sess., at 2, 5 (1934); H.R. Rep. No. 627, 72d Cong., 1st Sess., at 2 (1932). On the instant coverage issues before the district court, Underwriters firmly believe that the claims in the underlying judgment are not covered or that they have policy defenses to any coverage as may exist. What Underwriters seek is a prompt declaration, at the earliest juncture, so that they can adjust their conduct accordingly. With the uncertainties settled, the legal relations of the parties then may be fixed. A speedy resolution of the coverage issues is of obvious importance to Underwriters.

Effectuating congressional intent and other policy considerations of federalism and comity, as much as

²¹ While hypothetically possible, practical experience teaches that a district court after trial on the merits will not wilfully refuse a litigant relief it has proven itself entitled to, simply because the court would have preferred to have ridden itself of the matter on jurisdictional grounds at the outset. See *Moses H. Cone*, 460 U.S. at 36 (Rehnquist, J., dissenting: "There was no reason to believe that the District Court would not have acted promptly to resolve the dispute on the merits after being reversed on the stay."). Federal jurisdiction should not be cast aside where the declaratory plaintiff in fact presents issues on which it deserves a declaration of rights and a beneficial purpose would be served by such declaration. Borchard, DECLARATORY JUDGMENTS at 279 & n. 1.

adherence to this Court's commands regarding abstention, require that the *Colorado River*-*Moses H. Cone* presumption of jurisdiction apply absent exceptional circumstances. *Colorado River* rejected any "doctrine of equity that a federal court should exercise its judicial discretion to dismiss a suit merely because a State court could entertain it." *Colorado River*, 424 U.S. at 813-14. The Court has never wavered from its "fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court . . . can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims." *England v. Louisiana Bd. of Medical Examiners*, 375 U.S. 411, 415 (1964) (Pullman abstention). "It is to penalize petitioners for resorting to a jurisdiction which they were entitled to invoke, in the absence of any special circumstances which would warrant a refusal to exercise it." *Winter Haven*, 320 U.S. at 237. "The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied." *New Orleans Pub. Serv., Inc.*, 491 U.S. at 359.

If the only restraints on a district court's discretion are that its decision to stay or dismiss a declaratory judgment action is not to be governed by bias, nor to be either arbitrary or capricious, the mere pendency of a state court action will be considered sufficient grounds to abstain. Such practice would violate the mandate that a district court not cavalierly cast aside its responsibility to resolve matters within its jurisdiction. *Id.* at 358.

Nonetheless, the Hills squarely argue that the presumption should be against the district court exercising

its declaratory judgment relief authority any time there is a parallel state court action. J.A. 18; RII 113. While neither court below expressly adopted this presumption,²² this Court must clarify whether this position is consistent with the statutory intent and constitutional mandates. The entire insurance industry, as well as other parties who rely upon the declaratory judgment mechanism to obtain adjudication of disputes before neutral federal fora, need to know whether the declaratory judgment procedure can be denied simply by the filing of a state court case once the declaratory judgment action is commenced.

The practical consequence of this position is that district courts in the Fifth Circuit will have no obligation to exercise their jurisdiction. The *de facto* presumption entertained by the district court below and supported by the Hills' and the Ninth Circuit's position, is contrary to this Court's pronouncement that, "Abdication of the

²² The inference is unmistakable that the district court below indulged a *de facto* presumption that an insurer always acts preemptively in filing a declaratory judgment action, no matter how much later the insured files its own suit. See *Robsac Indus.*, 947 F.2d at 1372-73 (whether an insurer's declaratory judgment action is "filed first or second, it is reactive, and permitting it to go forward when there is a pending state court case presenting the identical issue would encourage forum shopping in violation of the second *Brillhart* principle."). The Hills' Motion to Dismiss or Stay cited this case six times, and quoted at length its "presumption that the entire suit should be heard in state court." J.A. 18-20; RII 113-16. The Hills' counsel also raised the case at some length during the dismissal-stay hearing. RII 268 Transcript pp. 24-25. This Court should reject the proposition of the Fifth and the Ninth Circuit precedents underlying the decision below.

obligation to decide cases can be justified under [the abstention] doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest." *Colorado River*, 424 U.S. at 813. The proffered presumption will turn on its head the traditional approach that abstention is to be "the exception, not the rule."²³ The standardless decision to abstain and near presumption against the declaratory judgment plaintiff amount to an authorization to district courts to "decline to entertain such an action as a matter of whim or personal disinclination." *Rickover*, 369 U.S. at 112.

While the Court should hold the analytical framework and six factors established in *Colorado River* and *Moses H. Cone* directly applicable to abstention decisions in diversity-based cases under the Declaratory Judgment Act, Underwriters believe it is, in appropriate circumstances, necessary to consider additional factors beyond those delineated in *Colorado River-Moses H. Cone. Moses H. Cone*, 460 U.S. at 26, 28.

Additional reasons for the federal court to exercise the proper jurisdiction and refuse to stay the federal proceeding are present in this action, as well as in many other insurer declaratory judgment actions. First, this case presents a concern of international comity because of the presence of regulated entities subject to British and other nations' law. Haling foreign nationals before state

²³ *Colorado River*, 424 U.S. at 813; *New Orleans Pub. Serv., Inc.*, 491 U.S. at 359; *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236 (1984); *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 125-28 (1968).

courts is disruptive to the conduct of sovereign relations and was the basis for providing federal jurisdiction for suits involving "citizens or subjects of foreign states." 28 U.S.C. § 1332(a). Also, extensive foreign discovery may necessitate resort to international treaties governing foreign parties' production of documents and financial information their governments may accord absolute privilege. Underwriters contend that some weight should be accorded the concern for international comity as a proper consideration in the abstention equation.

Another factor appropriate to supplement the *Colorado River* analysis in similar insurance cases is the fact that not all insurance vehicles present connected issues. Discrete and separate coverage defenses under different policy forms or in different insurance and reinsurance contexts are one example. Another example is prejudice to one group of insurers by being joined with other insurers where claims are presented for breach of the duty of good faith. In short, prejudice to the declaratory judgment plaintiff arising from confusion of issues should also be a factor in the abstention equation.

Both these considerations comport well with the existing *Colorado River-Moses H. Cone* analysis and stem from the same equitable considerations. Like choice of law and jurisdiction over property, only some cases will implicate international comity or prejudicial confusion of parties or issues. However, they are important enough in cases such as the one at bar to justify setting them apart from the existing six factors.

III. Applied to the instant facts, a searching review of the *Colorado River-Moses H. Cone* factors reveals no exceptional circumstances as to warrant a stay of this declaratory judgment action.

If the *Colorado River-Moses H. Cone* test is applied to the circumstances of this suit and the parallel state court proceeding, then the courts below erred in agreeing to stay this proceeding. When jurisdiction is properly invoked, the inquiry "is not to find some substantial reason for the *exercise* of federal jurisdiction by the district court; rather the task is to ascertain whether there exist 'exceptional' circumstances, the 'clearest of justifications,' that can suffice under *Colorado River* to justify the *surrender* of that jurisdiction." *Moses H. Cone*, 460 U.S. at 25-26 (original emphasis). The Fifth Circuit not only fails to weigh the abstention criteria in light of the nearly unflagging obligation to exercise jurisdiction, but ignores the critical factors identified by this Court as establishing, in rare cases, the important countervailing state interests that warrant deference to the state court proceeding. As applied to the instant facts, there are no exceptional circumstances that would warrant declining to hear this suit.

Had the district court engaged in the correct analysis, it too could not have concluded that a stay was appropriate. Two of the three bases the district court found to justify staying this action (forum shopping and reactive filing in anticipation of litigation) were erroneous as a matter of law. The district court's final factual determination, that piecemeal litigation could be avoided by giving preference to the state court suit was also erroneous, and its ultimate conclusion untenable as a matter of law. This

Court should reverse and remand with instructions to accept jurisdiction of the proceeding.

(1) Because No Real Property is Involved, the First Factor Favors the Exercise of Jurisdiction by the District Court.

The first factor set forth in *Colorado River* is not involved in this case because there is no issue of jurisdiction over real property. The absence of a factor is equated to the *absence* of exceptional circumstances and supports the exercise of jurisdiction by the district court. *See Moses H. Cone*, 460 U.S. at 19.

(2) The Federal Court in Houston is Not an Inconvenient Forum.

The Hills have conceded that Harris County was the most appropriate venue, and that Travis County was neither convenient nor proper for this coverage dispute. Accordingly, it was clearly erroneous to find, and an abuse of discretion for the district court to hold, that Travis County was a preferred forum for litigation between these parties.

Stay of this case in favor of the Travis County proceeding resulted in the predicted venue battle (RI 220), with the case ultimately being transferred to Harris County by agreement of the parties. Travis County had no connection to either the underlying or the insurance coverage matters. Contrary to the finding of the district court that Underwriters forum shopped, Harris County is the most logical venue for a dispute over policies issued

in Houston by a broker with its sole place of business in Harris County. Harris County was the most proper and, in fact, a more convenient forum than Travis County. Consequently, this second *Colorado River* factor also directs the exercise of jurisdiction by the district court.

(3) Piecemeal Litigation is Not a Concern for the Hills.

The third *Colorado River* factor is concerned with avoiding piecemeal litigation.²⁴ However, all coverage claims between Underwriters and the Hills are present in this action; no other parties will be able to make claims on the policies in play, and all the Hills' primary policies for the policy year sued upon are unified in this coverage suit. Additionally, if the Hills are ever required to answer in this action, all their extracontractual claims will be mandatory counterclaims. Fed. R. Civ. P. 13a. If they plead their allegations for breach of contract and breach of the duty of good faith, all issues between these parties at issue in their later-filed state court suit will be before the court below. As between these parties, all issues will be identical.

²⁴ *Colorado River's* concern was not duplicative litigation, but piecemeal adjudication in more than one court, of a concrete, finite *res*: Colorado River water rights. *Colorado River*, 424 U.S. at 817-18. Duplicative litigation is, of necessity, present in every case involving a *Colorado River* abstention issue. *Moses H. Cone*, 460 U.S. at 14-15. The existence of a parallel state action in and of itself is not an exceptional circumstance justifying abstention. *New Orleans Pub. Serv., Inc.*, 491 U.S. at 359.

To the extent that the coverage issues now appear separately from the counterclaims the Hills have not yet raised on account of their motion pursuant to Fed. R. Civ. P. 12b, this is not the type of "piecemeal litigation" that concerned the Court in *Colorado River*. Nor would proceeding on the declaratory judgment action frustrate administration of justice by the state court.

Before the Hills may recover on their claims for alleged breaches of the duty of good faith, they must, of necessity, first establish that coverage under the policies exists. This is the very issue of Underwriters' declaratory judgment action. It is the practice in Texas to abate the claims for breach of the duty of good faith, pending resolution of the coverage issues,²⁵ and now Texas law requires a trifurcated process: first coverage, then breach of the duty of good faith, and only then punitive damages. *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 29-30 (Tex. 1994) (bifurcation of liability for punitive damages from award of punitive damages). In all likelihood, the entire state action would have been mooted by decision in the previously filed, further-advanced declaratory judgment action.

²⁵ *United States Fire Ins. Co. v. Millard*, 847 S.W.2d 668, 672-73 (Tex. App. – Houston [1st Dist.] 1993, no writ) ("Without abatement, the parties will be put to the effort and expense of conducting discovery and preparing for trial of ["bad faith"] claims that may be disposed of in a previous trial."). See also *Northwestern National Lloyd's Ins. Co. v. Caldwell*, 862 S.W.2d 44, 46-47 (Tex. App. – Houston [14th Dist.] 1993, no writ); *Progressive County Mut. Ins. Co. v. Parks*, 856 S.W.2d 776, 779 (Tex. App. – El Paso 1993, no writ).

And even if the coverage issues were to be adjudicated "piecemeal," there is no necessarily pejorative meaning to that term. Because of the posture of the discrete coverage issues in this action and the contrived, wrongly joined, and wholly unconnected causes of action of disparate parties against a separate group of insurers, this is one of those cases where it is more efficient to try certain issues independently of a generalized conflict. "Piecemeal litigation" has always been permitted where necessary to serve the ends of justice. Historically, equity courts weighed the adequacy of the relief in the other (usually common law) forum and the burdens of piecemeal litigation on the parties. *Brillhart* itself indicated that duplicative litigation would be necessary if the defenses or claims at issue in the federal suit would be "foreclosed under the applicable substantive law" or if the parallel proceeding itself could not obtain jurisdiction over all the parties. *Brillhart*, 316 U.S. at 495. See *Moses H. Cone*, 460 U.S. at 20 & n.22 ("relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement" (original emphasis)).

Finally, the Hills are unable to complain convincingly about "piecemeal litigation." The Hills have at no time indicated any desire for unitary coverage litigation. Neither the Travis County court, nor the Harris County court to which the action has been transferred, can adjudicate all of the Hills' insurance disputes, because the Hills themselves have chosen to litigate their coverage controversies in a piecemeal fashion. It is unfair and inequitable to reward the Hills' manipulation of the Dallas and Travis County suits to thwart this previously filed, entirely proper declaratory judgment action. If the Hills were

truly concerned about piecemeal litigation, they would have sued all their insurers, including Underwriters, in their already pending action in Dallas County.

(4) The District Court Should Not Have Abstained Because Underwriters' Declaratory Judgment Action Was Filed First.

Underwriters' declaratory judgment action was filed first in an effort to clarify their rights and liabilities under the policies in a neutral federal forum before the Hills made demand on Underwriters.²⁶ Because nothing had occurred in the parallel litigation other than mere filing, and the state court had not yet issued citations for the commencement of service upon the defendants including Underwriters, this fully-joined federal action was due precedence. The district court erred in finding the mere filing of the Travis County action a sufficient basis to decline to hear this suit.

In addition, Underwriters' declaratory judgment action would have been first-in-time even with respect to the Dallas County action, had the Hills truly wanted to litigate in one proceeding all coverage for the underlying Winkler County verdict. In none of the three proceedings have the Hills sought a comprehensive coverage determination against all possible carriers in a unitary proceeding. Consideration of the timing involved, when

²⁶ The Declaratory Judgment Act provides a litigant "an equal start in the race to the courthouse," and that is fine except where all other circumstances counsel that abstention is required. *Kerotest Mfg. Co. v. C-O Two Fire Equipment Co.*, 342 U.S. 180, 185 (1952).

Underwriters filed first and *before* any post-verdict demands for defense or coverage by the Hills, tilts this fourth *Colorado River* factor decidedly against abstention.

Moses H. Cone and *Colorado River* give precedence to the first-filed suit, with no attempt to ascribe an improper motive to a federal plaintiff who takes advantage of diversity jurisdiction and the rights accorded by the Declaratory Judgment Act. *See Moses H. Cone*, 460 U.S. at 13, 15-16. *Colorado River* expressly weighs the order in which the *fora* obtained jurisdiction in a way that current Fifth Circuit law – to the detriment of Underwriters – does not. *Colorado River*, 424 U.S. at 818.

The Hills next complain that as "natural plaintiffs" they have been denied some right, arguing that a "pre-emptive" declaratory judgment action wrested the choice of forum from them. Because the Declaratory Judgment Act was enacted to permit a party to "pre-empt" litigation, the Hills' "natural plaintiff" emphasis denies Underwriters, and all declaratory judgment plaintiffs, the affirmative means Congress provided to avoid having to wait until the "natural plaintiff" finally files suit.²⁷ This Court has previously held that, "It is immaterial that frequently, in the declaratory judgment suit, the positions

²⁷ Charles A. Wright, *LAW OF FEDERAL COURTS* § 100, at 712-13 (5th ed. 1994); *see Provident Tradesmens*, 390 U.S. at 127 (abstention inappropriate where federal declaratory judgment plaintiff would otherwise "have been compelled to wait upon the convenience of [state court] plaintiffs over whom it had no control"). *See also* Edwin Borchard, *The Declaratory Judgment – A Needed Procedural Reform*, Part II, 28 *YALE L.J.* 105, 131 (1918) (the absence of a procedure for construction of a contract in advance of its breach is a "crudity").

of the parties in the conventional suit are reversed; the inquiry is the same in either case." *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). Furthermore, "a federal court's disposition of such a case may well affect, or for practical purposes pre-empt, a future – or, as in the present circumstances, even a pending – state-court action. But there is no doctrine that the availability or even the pendency of state judicial proceedings excludes the federal courts." *New Orleans Pub. Serv., Inc.*, 491 U.S. at 373.

(5) Application of Texas Law in a Federal Case Based on Diversity is Not an Exceptional Circumstance Favoring Abstention.

The fifth abstention factor is governing law, which the Fifth Circuit does not even consider. *Travelers Ins.*, 996 F.2d at 778-79; *Granite State*, 986 F.2d at 97 & n.5; *Rowan Cos., Inc. v. Griffin*, 876 F.2d 26, 29 (CA5 1989). Where federal law provides the rule of decision or a federal question is implicated, this factor can only militate in favor of jurisdiction, never for abstention. *Moses H. Cone*, 460 U.S. at 14. Since many of the abstention decisions in declaratory judgment cases involve admiralty and maritime insurance matters, patents, trademarks, and the copyright laws, absence of choice of law as a consideration in the abstention equation should be fatal to the current Fifth Circuit test.

While Underwriters admit that no federal issues or interest are implicated in this coverage dispute, invocation of diversity jurisdiction is not a factor to be weighed for, or against, the convenience of the parties or the

adequacy of the parallel proceedings. *Id.* at 13-18; *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40 (1909). The purpose of the diversity statute, 28 U.S.C. § 1332, as well as of the Declaratory Judgment Act, would be undermined if this Court allows district courts to stay or dismiss an action each time a parallel state court action is filed – simply because no federal statute or issue is in play. The district court should have exercised jurisdiction because the application of state law is not a sufficient exceptional circumstance to warrant abstention and "Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds." *New Orleans Pub. Serv., Inc.*, 491 U.S. at 359; *Kline v. Burke Construction Co.*, 260 U.S. 226, 234 (1922).

(6) The Federal Forum is Better Suited to Adjudicate the Matter and to Protect Underwriters' Rights.

On the final *Colorado River-Moses H. Cone* factor, Underwriters concede that the state court is competent to address the legal issues at the heart of this declaratory judgment action. However, state court competence to handle the legal issues is not the question; only if the state court is demonstrably *better qualified* to handle an action does this factor support abstention. *Moses H. Cone*, 460 U.S. at 26-28. Inadequacy of the Travis County court to adjudicate this dispute is raised by the previously discussed joinder and venue problems, however. As the Hills now concede that Travis County was an improper forum, Underwriters clearly prevail on this issue.

The second inadequacy of the parallel proceeding is that Underwriters face a significantly longer wait until trial in the state court. Not only have the joinder of unrelated parties and causes of action made extra discovery very likely, but additionally, joinder will require extraneous motion practice. Underwriters will also face delay simply because the state courts are not as efficiently moving their dockets,²⁸ as are the district courts in the Southern District of Texas since the reforms of 1989.²⁹

²⁸ National Center for State Courts, *State Court Caseload Statistics, Annual Report 1992* § 8, at 2, 12-13 (1994) (with 83 times as many criminal and 41 times as many civil cases, but only 15 times as many judges as the federal judiciary, state courts are unable to deal with their congested dockets, especially as increases in the federal diversity amount mean that new "filings are rising much more rapidly in state courts than in federal courts.").

²⁹ According to the Administrative Office of the United States Courts, the Southern District of Texas tries some three percent of all cases filed; of those three percent of cases tried, the median time interval between filing and trial disposition is only 21 months. Furthermore, the Southern District of Texas disposes of roughly three-quarters of all civil cases before the pretrial stage, with the median time between filing and disposition of just eight months. Administrative Office of the United States Courts, 1993 *United States Courts: Selected Reports*, Appendix C-5 to the Annual Report of the Director, at 85 (1993) (cases pending have decreased each of the last four years for the federal courts nationwide, and in the last three years in the Southern District of Texas, while federal courts generally and specifically the Southern District have cleared more cases than have entered their dockets for three of the last five years). See also Federal Judicial Center, *Planning for the Future: Results of a 1992 Federal Judicial Center Survey of United States Judges* 4, 26 & 33 (1994) (citing perceived bias and delay as prime reasons litigants with a choice would opt for a federal forum).

The state forum is inadequate in two other respects. This case involves foreign parties. The coverage issues may, and the extracontractual issues certainly will, involve extensive foreign discovery. The need to resort to international treaties governing foreign discovery indicates a disadvantage to having this case in state court. Additionally, Underwriters' rights and privileges from disclosure will be better respected in federal court than in state court discovery, where sanctions can include dismissal or default for failure to produce financial records. Tex. R. Civ. P. 215(2)(b)(5).

In state court, Underwriters also may be unable to obtain summary judgment on their coverage obligations and defenses, even though those issues are preliminary matters under Texas law to the action for a breach of the duty of good faith. While coverage must necessarily be resolved before alleged breaches of the duty of good faith are reached, Texas practice is still to submit to the jury the operative facts dispositive of the coverage question.³⁰

³⁰ The Texas Supreme Court has made the contrast in summary judgment practice truly stark: "In the federal system, '[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules.' . . . Texas law, of course, is quite different. While the language of our rule is similar, our interpretation of that language is not. We use summary judgments merely 'to eliminate patently unmeritorious claims and untenable defenses,' and we never shift the burden of proof to the non-movant unless and until the movant has 'establish[ed] his entitlement to a summary judgment on the issues expressly presented to the trial court by conclusively proving all essential elements of his cause of action or defense as a matter of law.' . . . While some commentators have urged us to adopt the

In the federal proceeding, the coverage issues could be resolved on Underwriters' motion for summary judgment, thereby making the parallel state court proceeding unnecessary. Judicial economy was disserved when the district court granted the stay of this fully joined federal contest in favor of a weeks' old proceeding.

The final inadequacy of the Texas action is the mis-joiner of disparate parties' separate causes of action against their own insurers with the Hills' claims against Underwriters. Joining the Hills' claims against Underwriters with the claims of different insureds against separate domestic carriers for alleged breaches of the duty of good faith will undoubtedly prejudice Underwriters. The Hills evidently hope that the various insurers' alleged misdeeds will be lumped together in the factfinders' minds. By confusing the issues, the Hills obviously desire to taint one group of insurers, Petitioners, with the conduct of the

current federal approach to summary judgments generally, e.g., Hittner & Liberato, *Summary Judgments in Texas*, 20 ST. MARY'S L.J. 243, 303-05 (1989), we believe our own procedure eliminates patently unmeritorious claims while giving due regard for the right to a jury determination of disputed fact questions." *Cassio v. Brand*, 776 S.W.2d 551, 556-57 (Tex. 1989) (citations omitted). See also David Hittner, Lynne Liberato, & Bruce Ramage, *SUMMARY JUDGMENTS AND DEFAULTS IN THE STATE COURTS OF TEXAS* § A(4) (High Reversal Rate for Summary Judgments), at 3 & § I (State Contrasted with Federal Summary Justice Practice), at 56-58 (1992).

other group of insurers, where the Hills are not even advancing claims against those other defendants.³¹

Even if the state court proceedings were adequate to determine Underwriters' rights and liabilities under the policies, an exercise of jurisdiction by the district court was compelled because of the lack of exceptional circumstances under *Colorado River* and *Moses H. Cone*. This adequate-forum consideration focuses attention on the comprehensiveness and legitimacy of the state court action, and is addressed from the perspective of retaining jurisdiction. This factor does not require that the state forum be *inadequate* for the exercise of jurisdiction, because an inadequate parallel action *mandates* the exercise of federal jurisdiction. *Moses H. Cone*, 460 U.S. at 28.

The two additional considerations *Moses H. Cone* added to the abstention equation never weigh against retaining jurisdiction. *Moses H. Cone*, 460 U.S. at 26, 28. The choice-of-law and adequate-forum factors only provide additional reasons for retaining jurisdiction. So the lack of such issues in a diversity action would not, alone,

³¹ Here, no pro-abstention weight can properly be afforded the Hills' joinder in the Travis County suit of the Hunts' claims against other insurers, where Petitioners wrote no coverage for nor have any connection with, the additional Travis County plaintiffs; these Hunt plaintiffs do not, and could not, assert any claims or rights against these Underwriters. RII 126 ¶¶36-37, 136; RII 268 Transcript pp. 7-8 & 23-24. Nor do Petitioners have any relationship (related to this dispute) with those other, domestic insurers. Consequently, any additional parties present in the Travis County action in no way present related issues to the coverage Petitioners provided or to Petitioners' handling of the Hills' claims. RII 268 Transcript pp. 7-8 & 23-24.

be a sufficient reason to abstain. If it were, not only the Declaratory Judgment Act, but also the diversity statute, would be rendered nugatory. Even if the Court believes Underwriters' rights and interests might be sufficiently protected in the Texas state court, no weight in favor of abstention is found. As a final point, the Hills can not even allege an inadequacy of the federal forum to adjudicate the coverage questions at issue in this action.

CONCLUSION

For these reasons, the Court should determine that the courts of appeals review *de novo* the decision to dismiss or stay a declaratory judgment action, which determination must include a consideration of the *Colorado River-Moses H. Cone* test. This Court should reverse the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on June 29, 1994, and, pursuant to 28 U.S.C. § 2106, remand the cause to the District Court for the Southern District of Texas, Houston Division, and order that it accept jurisdiction.

Respectfully submitted,

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FEB 13 1995

In The

COURT OF THE UNITED STATES

Supreme Court of the United States

October Term, 1994

LESLIE WILTON, ON BEHALF OF HIMSELF AND AS A REPRESENTATIVE OF CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON, AND CERTAIN INSTITUTE OF LONDON UNDERWRITERS COMPANIES, AS FOLLOWS, THE ORION INSURANCE COMPANY, PLC, SKANDIA U.K. INSURANCE PLC, THE YASUDA FIRE & MARINE INSURANCE COMPANY OF EUROPE, LTD., OCEAN MARINE INSURANCE CO., LTD., YORKSHIRE INSURANCE CO., LTD., MINSTER INSURANCE CO., LTD., PRUDENTIAL ASSURANCE CO., LTD., PEARL ASSURANCE PLC, BISHOPSGATE INSURANCE LTD., HANSA MARINE INS. CO. (UK) LTD., VESTA (UK) INS. CO., LTD., NORTHERN ASSURANCE CO., LTD., CORNHILL INSURANCE CO., LTD., SIRIUS INSURANCE CO., (UK) LTD., SOVEREIGN MARINE & GENERAL INSURANCE CO., TOKIO MARINE & FIRE INSURANCE (UK) LTD., TAISHO MARINE & FIRE INSURANCE CO. (UK) LTD., STOREBRAND INSURANCE CO. (UK) LTD., ATLANTIC MUTUAL INSURANCE CO., ALLIANZ INTERNATIONAL INSURANCE CO., LTD., AND WAUSAU INSURANCE CO. (UK) LTD.,

Petitioners,

v.

SEVEN FALLS COMPANY, MARGARET HUNT HILL, ESTATE OF A.G. HILL, LYDA HILL, ALINDA H. WIKERT, AND U.S. FINANCIAL CORP.,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

- I. Does the "exceptional circumstances" test apply to a federal district court's determination of whether to abstain from exercising its jurisdiction in a declaratory judgment action?
- II. Should a trial court's decision to abstain in a declaratory judgment action be reviewed *de novo* or by an abuse of discretion standard?
- III. Even if the "exceptional circumstances" test applies, was the district court's stay order proper?

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In The
Supreme Court of the United States

October Term, 1994

LESLIE WILTON, ON BEHALF OF HIMSELF AND AS A
REPRESENTATIVE OF CERTAIN UNDERWRITERS AT
LLOYD'S OF LONDON, AND CERTAIN INSTITUTE OF
LONDON UNDERWRITERS COMPANIES, AS FOLLOWS, THE
ORION INSURANCE COMPANY, PLC, SKANDIA U.K.
INSURANCE PLC, THE YASUDA FIRE & MARINE
INSURANCE COMPANY OF EUROPE, LTD., OCEAN
MARINE INSURANCE CO., LTD., YORKSHIRE INSURANCE
CO., LTD., MINSTER INSURANCE CO., LTD., PRUDENTIAL
ASSURANCE CO., LTD., PEARL ASSURANCE PLC,
BISHOPSGATE INSURANCE LTD., HANSA MARINE INS. CO.
(UK) LTD., VESTA (UK) INS. CO., LTD., NORTHERN
ASSURANCE CO., LTD., CORNHILL INSURANCE CO., LTD.,
SIRIUS INSURANCE CO., (UK) LTD., SOVEREIGN MARINE &
GENERAL INSURANCE CO., TOKIO MARINE & FIRE
INSURANCE (UK) LTD., TAISHO MARINE & FIRE
INSURANCE CO. (UK) LTD., STOREBRAND INSURANCE CO.
(UK) LTD., ATLANTIC MUTUAL INSURANCE CO., ALLIANZ
INTERNATIONAL INSURANCE CO., LTD., AND WAUSAU
INSURANCE CO. (UK) LTD.,

v.

Petitioners,

SEVEN FALLS COMPANY, MARGARET HUNT HILL,
ESTATE OF A.G. HILL, LYDA HILL, ALINDA H. WIKERT,
AND U.S. FINANCIAL CORP.,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENTS

Respondents file this Brief in Opposition to the Brief of Petitioners.

STATEMENT OF THE CASE

This is an insurance coverage dispute arising out of three underlying lawsuits, two of which were consolidated in the District Court of Winkler County, Texas. The third lawsuit is pending in the District Court in Dallas County and has been stayed in deference to the Winkler County litigation. R II 119. Each of the three underlying lawsuits involves a dispute over the ownership and/or operation of certain oil and gas properties located in Winkler County, Texas. R III 3.

Well prior to the Winkler County litigation proceeding to trial, Respondents (the "Hill Group") requested Petitioners ("London Underwriters") to provide them with coverage under several policies of commercial liability insurance issued by London Underwriters to the Hill Group. London Underwriters, pursuant to a series of letters dated July 31, 1992, refused to defend or indemnify the Hill Group in either the Dallas or Winkler County actions. R I 185-88, 204; R III 268. In late September, 1992 the consolidated Winkler County suits proceeded to trial. After a three week trial, a verdict in excess of \$100 million was rendered against the Hill Group and others. R II 118-19.

London Underwriters were given notice of the Winkler County verdict by counsel for the Hill Group in late November, 1992. R II 145-47, 150 at ¶ 2. On December 9, 1993, before a judgment was even entered on the Winkler

County verdict and despite the fact that London Underwriters had previously denied coverage to the Hill Group for the Winkler County litigation, London Underwriters, anticipating litigation from the Hill Group and desiring to shop for the most advantageous forum, instituted Civil Action No. H-92-3749, a declaratory judgment action identical to this one, in the United States District Court for the Southern District of Texas. R I 261-63; R II 118; J.A. 23-26. London Underwriters' original suit was dismissed without prejudice pursuant to an agreement of counsel which required the Hill Group to give fourteen days notice of their intent to commence any future litigation against London Underwriters.¹ R II 118, 139-44, 150 ¶ 3.

Counsel for the Hill Group requested London Underwriters to dismiss their original declaratory judgment action primarily in order to avoid the possibility that the mere existence of London Underwriters' declaratory judgment action might jeopardize ongoing negotiations between the Hill Group and certain of their other insurers regarding the underlying Winkler County litigation. R III 3-4. The Hill Group maintained insurance coverage with these other insurers in the amount of at least \$100 million. R III 3. The insurance coverage at issue in this action, while substantial in amount, would not have been sufficient to supersede the Winkler County judgment. R III 19. Thus, while it is true that these other insurers were the

¹ The provision requiring the Hill Group to give fourteen days advance notice prior to filing an action against London Underwriters was designed to preserve the status quo by allowing London Underwriters to retain their perceived advantage in having the first suit on file. R II p.141 ¶ 1.

Hill Group's primary target, at no time did the Hill Group represent that London Underwriters would never be a target or that they would never pursue claims under the policies at issue in this case. The fourteen day notice provision in the parties' letter agreement clearly evidences this fact. R II 141 ¶ 1.

On February 12, 1993, the Winkler County District Court entered a judgment on the jury's verdict. R III 4-5. Shortly thereafter, on February 17, 1993, the Hill Group's other insurers instituted a declaratory judgment action against the Hill Group. That action was styled *Ronald Malcolm Pateman, et al. v. Margaret Hunt Hill, et al.*, Cause No. 93-1658, and was filed in the 298th Judicial District Court in Dallas County, Texas. R III 4-5. The Hill Group instituted their own action against those other insurers in Dallas County on February 24, 1993. That action was styled *Margaret Hunt Hill, et. al. v. Ronald Malcolm Pateman, et al.*, Cause No. 93-01929. R I 204 ¶7, 152-183, 224. The two Dallas County actions were subsequently consolidated in the 298th Judicial District Court.

In light of the fact that the Hill Group's negotiations with their other insurers had fallen through and become the subject of litigation, the Hill Group saw no point in further postponing resolution of all of their insurance coverage questions with all of their insurers. R III 5. Accordingly, on February 23, 1993, counsel for the Hill Group gave notice, pursuant to the terms of the letter agreement, of the Hill Group's intent to bring an action in state court against London Underwriters. R II 138, 150 ¶ 4. That same day, London Underwriters refiled this action. R II 1-110.

Thereafter, on March 26, 1993, the Hill Group filed their state court action against London Underwriters. R II 120-37, 150 ¶ 5. In the state court action, the Hill Group asserted claims against London Underwriters for, *inter alia*, breach of contract and breach of the duty of good faith and fair dealing. The state court action also names as Plaintiffs various members of the Hunt family and their related entities (the "Hunt Group") who are also judgment debtors in the Winkler County litigation. The Hunt Group is likewise asserting claims for coverage and for bad faith against its insurers, Underwriters Indemnity Company and Planet Indemnity Company, in the state court action. Contrary to London Underwriters' assertions, the claims of the Hunt Group against their insurers were properly joined in the state court action because the claims of the Hill and Hunt Groups are interwoven with one another in that they involve the same facts and issues.²

² This case is really no different than any environmental coverage case involving a polluted property site which has been owned by multiple owners, each of whom have been insured by different insurers. Those cases are routinely tried together because they involve the same facts and issues, notwithstanding the fact that there are separate groups of plaintiffs having separate coverage claims against different insurers. See, e.g., IELA Amicus Brief at p. 2, n. 2. Similarly, in this case, the pleadings and conduct at issue in the underlying lawsuits, upon which the carriers' duties to defend and indemnify will be adjudged, both involve the same facts and issues. The policies issued by the carriers for the Hunt and Hill Groups, while not identical, do contain similar insuring and exclusionary provisions. Thus, the same questions of law and fact which are crucial to the resolution of this dispute will also be necessary to resolve the Hunts' claims against their insurers. As a result, the claims were properly joined under Texas law. See, e.g., *State Dept. of Highways v. Cotner*, 845 S.W.2d 818, 819 (Tex. 1993).

On the same day that they instituted the state court action, the Hill Group filed their Rule 12 Motion to Dismiss or Stay in this case, requesting that this action be dismissed or stayed in deference to the state court action. R II 112-19. On June 30, 1993, the district court granted the Hill Group's Rule 12 Motion, staying this action pending resolution of the state court action. J.A. 23-26. The district court did not, as suggested by London Underwriters and the amicus parties, refuse to exercise jurisdiction based solely upon the mere existence of a concurrent state court proceeding. Petitioners' Brief at pp. 9, 17, 20, 24; IELA Brief at pp. 1, 3, 4, 6, 8, 9, 12, 19, 30; MLA Brief at pp. 12-13. Rather, in its order staying this action, the district court found that a stay was appropriate because (1) London Underwriters filed their original declaratory judgment action in anticipation of litigation by the Hill Group; (2) that action was filed as a means of forum-shopping; (3) London Underwriters' rights would adequately be protected in the state court proceeding in that London Underwriters could assert their claims in this action as defenses or counterclaims in the state court proceeding; (4) exercising jurisdiction in this case would result in piecemeal litigation; and (5) it would be inequitable to allow London Underwriters to gain precedence in the choice of forum. J.A. 25. The Fifth Circuit, finding no abuse of discretion in these determinations, affirmed the district court's decision. J.A. 27-30. London Underwriters now appeal these rulings to this Court.

SUMMARY OF ARGUMENT

This Court has made it clear on repeated occasions that a district court's decision to exercise jurisdiction over

a declaratory judgment action is a matter committed to the sound discretion of the district court. Concerns that federal courts have a virtually unflagging obligation to exercise jurisdiction are irrelevant in the context of declaratory judgment actions because Congress, in creating the Declaratory Judgment Act, specifically gave district courts discretion concerning whether to hear such actions. Thus, the judicially-formed "exceptional circumstances" test set forth in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) and *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1 (1983), which normally governs the determination of whether it is proper for a federal court to abstain from exercising its jurisdiction in a particular case, does not apply to declaratory judgment actions.

At least two prior holdings of this Court construing a federal court's discretionary exercise of its jurisdiction under the Declaratory Judgment Act compel the conclusion that the decisions of the courts below must be affirmed. First, in cases like the instant one where the first-filed complaint for declaratory relief does nothing more than assert a defense to an impending state court action not involving a question of federal law, this Court, in *Public Service Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237 (1952), has indicated that a federal court should not entertain jurisdiction. Second, in *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 495 (1942), this court determined that a court should not ordinarily exercise its discretion to hear a declaratory judgment action where, as is the case here, there is another suit between the parties pending in state court that presents the same issues not governed by federal law.

This Court's rationale in *Brillhart* for allowing district courts broad discretion in determining whether to exercise jurisdiction in a declaratory judgment action had three principal bases: (1) avoidance of having federal courts needlessly determine issues of state law; (2) discouraging litigants from filing declaratory judgment actions as a means of forum shopping; and (3) avoiding duplicative litigation. Each of these factors support abstention here. First, there is no dispute that this insurance coverage dispute is governed by state law. Second, the courts below correctly concluded that London Underwriters' brought this action in anticipation of litigation and that entertaining jurisdiction over this declaratory judgment action would reward London Underwriters' attempts to forum shop. Third, the courts below properly recognized that declining the exercise of jurisdiction in this case would avoid duplicative litigation. Thus, under both the holding and rationale of this Court's decision in *Brillhart*, the district court's decision to abstain from exercising its jurisdiction was entirely proper.

A district court's determination whether to exercise jurisdiction should be reviewable under an abuse of discretion standard. Such a standard has been employed by this Court in reviewing abstention determinations under both the Declaratory Judgment Act and under other abstention doctrines. However, regardless of the standard of review applied - *de novo* or abuse of discretion - either standard would have yielded the same result in this case. Even so, all of the factors relating to the allowance of broad discretion to the district court in determining whether to entertain a declaratory judgment action support an abuse of discretion standard. The standard is

consistent with not only the Declaratory Judgment Act, but with common sense. The district courts, in fulfilling whatever obligation they may have to exercise jurisdiction, should not be deprived of the discretion to decline jurisdiction over a declaratory judgment action where, as here, the declaratory judgment action is instituted as a means of forum shopping, no issue of federal law is presented, the declaratory relief sought is nothing more than a defense to the state court action, and maintenance of two parallel suits would result in duplicative, piece-meal litigation.

Finally, even if the "exceptional circumstances" test were applicable to a district court's determination of whether to exercise jurisdiction in a declaratory judgment action, the trial court properly refused to exercise jurisdiction in this case. The factual findings made by the district court demonstrate not only that abstention is proper under *Brillhart* and its progeny, but also that the requisite "exceptional circumstances" warranting abstention are present here. That the district court's findings also demonstrate the existence of such exceptional circumstances is not surprising since the *Colorado River/Moses H. Cone* factors themselves run substantially parallel to the criteria that have historically been deemed relevant to a court's determination of whether to accept or decline jurisdiction in a declaratory judgment action.



ARGUMENT

I. A Federal Court has the Discretion to Refuse to Entertain a Declaratory Judgment Action if There is a Pending State Action in Which all Issues can Effectively be Determined.

The unique nature of declaratory judgment actions forms the basis for the departure from the general rule disfavoring abstention. *See* 17A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4247 at 118-20 (2nd ed. 1988) (noting the special nature of a declaratory judgment as supporting abstention in a declaratory judgment action). Generally, abstention is disfavored and "exceptional circumstances" are required before abstention is proper. *Colorado River*, 424 U.S. at 813-819; *see also* *Moses H. Cone*, 460 U.S. at 14-16. When an action is one for declaratory judgment, however, the district court should have broad discretion to defer to a similar state action.

A. The Declaratory Judgment Act Does Not Obligate a District Court to Exercise its Jurisdiction in a Declaratory Judgment Action.

Declaratory relief, both by its nature and under the plain language of the Declaratory Judgment Act, 28 U.S.C. § 2201, is discretionary. *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111, 112 (1962) (*per curiam*); *Cardinal Chemical Co. v. Morton Int'l, Inc.*, 113 S. Ct. 1967, 1974 n. 17 (1993). The Declaratory Judgment Act is uncommon in that it neither imposes an unflagging duty upon the courts to decide declaratory judgment actions nor grants entitlement to litigants to demand declaratory

remedies. *See Green v. Mansour*, 474 U.S. 64, 72 (1985). In other words, the Declaratory Judgment Act is an authorization, not a command. It gives federal courts competence to make a declaration of rights; it does not impose a duty to do so. *Rickover*, 369 U.S. at 112. *See also* Edwin Borchard, *Declaratory Judgments* at 231-41 (2nd Ed. 1941).³ The legislative history of the Declaratory Judgment Act itself shows that "large discretion is confirmed upon the courts as to whether or not they will administer justice by the procedure." *See* H.R. Rep. No. 1264, 73rd Cong. 2nd Sess. at 2 (1934).⁴ *See, also* 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, § 2759 at 644 (1983) (noting that the draftsmen of the Declaratory Judgment Act rejected the view that the terms of Act were mandatory and did not leave any discretion in the court to refuse jurisdiction). Thus, the decision whether to exercise jurisdiction over a declaratory judgment

³ Edwin Borchard is a co-draftsman of the Uniform Declaratory Judgments Act. London Underwriters contend that Prof. Borchard supports their position that a district court must hear a declaratory judgment action. The opposite is true. Specifically, Prof. Borchard wrote: "There is nothing automatic or obligatory about the assumption of jurisdiction by a federal court even if the parties are proper and jurisdictional amount present." *Edwin Borchard, Declaratory Judgments* at 313 (2nd ed. 1941).

⁴ Petitioners' representation of the content of the legislative history of the Declaratory Judgment Act is incorrect. Petitioners claim that the legislative history dictates that district courts *must* hear declaratory judgment actions. Petitioners' Brief at 22. Nowhere in the legislative history is there any such implied, much less, explicit requirement. The legislative history says the opposite. *See* H.R. Rep. No. 1264, 73rd Cong., 2nd Sess., at 2 (1934). In any event, this issue has been put to rest by this Court in *Brillhart, Rickover, Green and Cardinal*.

action is a matter committed to the district court's discretion. *Brillhart*, 316 U.S. at 492; *Cardinal*, 113 S. Ct. at 1974, n. 17.

The reason that the "exceptional circumstances" test does not apply to declaratory judgment actions also arises from the genesis of *Colorado River* and *Moses H. Cone*, as opposed to the origin of the Declaratory Judgment Act. One court determined that the importance of *Colorado River* and *Moses H. Cone* "lay in the fact that the Supreme Court gave its imprimatur to a judicially formed rule of abstention based mainly on notions of judicial economy in an era of severely crowded federal dockets." *U.S. Fidelity & Guar. v. Algernon-Blair, Inc.*, 705 F. Supp. 1507, 1521 (M.D. Ala. 1988); see also Howard A. Davis, *The Doctrine of Abstention to Promote Judicial Administration*, 33 Trial Law. Guide 564, 564-66 (1990) (noting that the goal of *Colorado River* is wise judicial administration); Michael T. Gibson, *Private Concurrent Litigation in Light of Younger, Pennzoil, and Colorado River*, 14 Okla. L. Rev. 185, 187-91 (1989).

In its analysis, the *Algernon-Blair, Inc.* court stated that this Court was so wary of approval of the practice of abstention for inappropriate grounds that it imposed severe restrictions on the discretion of the lower courts. *Algernon-Blair, Inc.*, 705 F. Supp. at 1521. Such a policy concern does not apply to declaratory judgment actions. In contrast, a district court's discretion over declaratory judgment actions originates in Congress, which has authority to design such statutory relief. Congress gave the court discretion in determining whether to exercise its authority. *Id.*; 28 U.S.C. § 2201; David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U.L.Rev. 543, 548 n. 24 (1985).

Thus, the exceptional circumstances test does not apply to declaratory judgment actions, because the concerns that prompted articulation of the test (e.g., that the federal courts have a "virtually unflagging obligation to exercise the jurisdiction given them," *Colorado River*, 424 U.S. at 817), are irrelevant in an action for declaratory relief under 28 U.S.C. § 2201, where the court is under no compulsion to exercise its jurisdiction.

Petitioners' argument that this Court's intervening decisions in *Colorado River* and *Moses H. Cone* have modified the abstention analysis applicable in declaratory judgment actions is misplaced. Petitioners' Brief at p. 17. In fact, the opposite is true. Subsequent to the decisions in *Colorado River* and *Moses H. Cone*, this Court has steadfastly adhered to its position in *Brillhart* that federal district courts are under no compulsion to exercise their jurisdiction in declaratory judgment actions and that the decision whether to defer to the concurrent jurisdiction of a state court is committed to the district court's discretion. *Cardinal*, 113 S. Ct. at 1974, n. 17; *Green*, 474 U.S. at 72.⁵

B. Abstention was Proper Because this Case is not an Appropriate One for Declaratory Relief.

As established above, district courts have discretion to exercise jurisdiction in declaratory judgment actions.

⁵ See also, *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 664 (1978) (plurality opinion), wherein now Chief Justice Rehnquist, after the decision in *Colorado River*, specifically indicated that the language from *Colorado River* referring to a federal court's virtually unflagging obligation to exercise its jurisdiction does not undermine the holding of *Brillhart* that the decision on whether to defer to the jurisdiction of a state court remains a matter committed to the district court's discretion.

However, in cases like the instant one where the complaint for declaratory relief seeks solely to assert a defense to an impending state court action not involving a question of federal law, a federal court should not entertain the claim for declaratory relief. *Public Service*, 344 U.S. at 248. This is because “[f]ederal courts will not seize litigations from state courts merely because one, nominally a defendant, goes to federal court to begin his federal law defense before the state court begins the case under state law.” *Id.*

There is an additional reason why the declaratory judgment remedy is inappropriate in this case. The Declaratory Judgment Act provides litigants with an affirmative federal remedy to be used *before* a potential breach of contract ripens into an actual breach of contractual duty. *Rowan Cos., Inc. v. Griffin*, 876 F.2d 26, 28 (5th Cir. 1989); MLA Amicus Brief at pp. 7, 11; IELA Amicus Brief at pp. 4, 20. London Underwriters claim to need a prompt adjudication of their legal rights under the policies in order to “fix” the legal relations of the parties and, if necessary, “adjust their conduct” in accord with a declaration from the court. Petitioners’ Brief at p. 22. However, this is not the usual declaratory judgment scenario in which a coverage question prompts an insurer to defend its insured under a reservation of rights while contemporaneously filing a declaratory judgment action in order to determine the parties’ rights and obligations under the policy. In this case, the relations and legal rights between the parties are already “fixed”. London Underwriters have denied coverage to their insureds in connection with the Winkler County litigation and a judgment in excess of \$100 million has been entered against

the Hill Group in that action. Thus, the breach of contract claim asserted in the state court action is ripe for determination, and it is too late for London Underwriters to now seek to adjust their conduct. As a result, this case simply is not an appropriate one for declaratory relief, and the decision to abstain was entirely appropriate.

C. Abstention Was Also Proper Under This Court’s Holding in *Brillhart*.

This Court provided guidance for the exercise of discretion in declaratory judgment actions in *Brillhart*. Under *Brillhart*, a district court should not ordinarily exercise its discretion to hear a declaratory judgment action where there is another suit between the parties pending in state court that presents the same issues, not governed by federal law. *Brillhart*, 316 U.S. at 495. *See also* *Provident Tradesmens B&T Co. v. Patterson*, 390 U.S. 102, 126 (1968) (same).

The court’s rationale in *Brillhart* had three principal bases: (1) avoidance of having federal courts needlessly determine issues of state law; (2) discouraging litigants from filing declaratory judgment actions as a means of forum shopping; and (3) avoiding duplicative litigation. *Chamberlain v. Allstate Ins.*, 931 F.2d 1361, 1366-67 (9th Cir. 1991). The case now before this Court demonstrates the sound policy underlying the *Brillhart* rationale and the reasons the trial court should be allowed to exercise its discretion in determining whether to hear declaratory judgment actions.

1. Granting Broad Discretion to the Trial Court Avoids Having Federal Courts Needlessly Determine Issues of State Law.

Federal courts should not needlessly determine issues of state law.⁶ A system of judicial federalism has enough inherent friction with the state system without the added aggravation of unnecessary federal declarations. *See Mitcheson v. Harris*, 955 F.2d 235, 240 (4th Cir. 1992). As one court noted:

To have sustained this suit for declaratory judgment would have been to drag this essentially local litigation into the federal courts and to defeat the jurisdiction of the state courts over it merely because one of the parties to the litigation happened to have indemnity insurance in a foreign insurance company.

Indemnity Ins. Co. v. Schriefer, 142 F.2d 851, 853 (4th Cir. 1944). Thus, even if a ruling by the district court on the declaratory judgment action clarified rather than confused the legal relationships of the parties:

[T]his clarification will come at the cost of "increas[ing] friction between our federal and state courts and improperly encroach[ing] upon state jurisdiction." The states regulate insurance companies for the protection of their residents, and state courts are best situated to identify and enforce the public policies that form the foundation of such regulation.

⁶ This dispute is governed by issues of state insurance law, an area of the law Congress has expressly left to the states through the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-12 (1988).

Allstate Ins. v. Mercier, 913 F.2d 273, 279 (6th Cir. 1990). Absent a strong countervailing federal interest, the federal court should not elbow its way into this controversy to render what may be an "uncertain and ephemeral" interpretation of state law. *Penhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 122 n. 32 (1984).

2. Granting Broad Discretion to the Trial Court Discourages Litigants From Filing Declaratory Judgment Actions as Means of Forum Shopping.

The second *Brillhart* policy is the interest in avoiding the use by litigants of declaratory judgments actions as a means of forum shopping. One court has described this factor as relating to "the 'defensive' or 'reactive' nature of federal declaratory judgment suit[s]," and stated that if a declaratory judgment suit is defensive or reactive, that would justify a court's decision not to exercise discretion. *Transamerica Occidental Life Ins. Co. v. Digregorio*, 811 F.2d 1249, 1254 n. 4 (9th Cir. 1987).

Irrespective of the state law nature of insurance coverage disputes, diversity jurisdiction is frequently present in a suit for declaratory relief because the insurer and the insured are citizens of different states. *See Continental Cas. Co. v. Robsac Indus.*, 947 F.2d 1367, 1371 n. 4 (9th Cir. 1991). The potential for manipulation of diversity jurisdiction often underlies insurance companies' strategy of bringing declaratory judgment actions against their insureds to avoid being a defendant in non-removable state court actions presenting the same issues of state law. This practice is the archetype of what the Ninth Circuit

terms "reactive" litigation. *Digregorio*, 811 F.2d at 1254 n. 4. Reactive litigation can occur in response to a claim an insurance carrier believes is not subject to coverage even though the claimant has not yet filed a state court action: the insurer may anticipate that its insured intends to file a non-removable state court action, and rush to file a federal action before the insured does so. See, e.g., *Continental*, 947 F.2d at 1372; *Granite State Ins. Co. v. Tandy Corp.*, 986 F.2d 94 (5th Cir. 1992), cert. granted, 113 S. Ct. 51 (1992), cert. dism'd, 113 S. Ct. 1836 (1993). Such anticipatory use of a declaratory judgment action is disfavored because it is an aspect of forum shopping.⁷ See *Public Service*, 344 U.S. at 248; *American Auto. Ins. Co. v. Freundt*, 103 F.2d 613 (7th Cir. 1939) ("the wholesome purposes of declaratory acts would be aborted by its use as an instrument of procedural fencing either to secure delay or choose a forum.")

Such a preemptive strike is exactly what London Underwriters attempted in this case. The district court specifically found that by initiating what is here the first-

⁷ London Underwriters and the amicus parties each argue that abstaining in declaratory judgment actions constitutes treason to the Constitution because it enables a district court to decline to exercise its congressionally-conferred jurisdiction based upon diversity of citizenship. This argument is misplaced for two reasons. First, a declaratory judgment action, in and of itself, does not confer federal jurisdiction. *Schilling v. Rogers*, 363 U.S. 666, 677 (1960). Second, as the IELA acknowledges, Congress has the power to restrict diversity jurisdiction, IELA Brief at pp. 18-19, and it effectively has done so by vesting the district courts with discretionary jurisdiction in declaratory judgment actions.

filed suit, London Underwriters were anticipating litigation from the Hill Group and attempting to forum shop when they initiated this lawsuit. J.A. 25. That finding is fully supported by the fact that London Underwriters filed this declaratory judgment action shortly after being notified of the adverse Winkler County jury verdict and irrespective of the fact that London Underwriters had already denied coverage to their insureds. Thus, even though London Underwriters filed suit in federal court before the Hill Group filed its state court action, they did so because they were aware of the Hill Group's claim and hoped to preempt any state court proceeding. Under these circumstances, London Underwriter's filing of their original declaratory judgment action was reactive notwithstanding the fact that it was the first-filed suit. See e.g., *Continental*, 947 F.2d at 1372-73.

Permitting this declaratory judgment to proceed when there is a pending state court case presenting the identical issue would encourage forum shopping races to the courthouse. The consequences of London Underwriters' argument that a district court cannot abstain if an insurance company decides to beat its insured to court would be virtually to license the preemptive strike by insurers so they can (1) fix venue they consider favorable or convenient to them and (2) promote, not avoid duplicative, piecemeal litigation. Furthermore, regardless of the degree of bad faith in which that declaratory judgment action is brought, the district court would have little or no discretion over whether to hear it.

3. Granting Broad Discretion to the Trial Court Avoids Duplicative Litigation.

The next *Brillhart* policy favors dismissal of declaratory judgment actions in favor of resolving all litigation stemming from a single controversy in a single court system. There is no sense, as a matter of judicial economy, for a federal court to entertain a declaratory judgment action when the result would be to "try a controversy by piecemeal, or to try particular issues without settling the entire controversy." *Aetna Cas. & Sur. Co. v. Quarles*, 92 F.2d 321, 325 (4th Cir. 1937). As this Court wrote, for a federal court to charge headlong into the middle of a controversy which is the subject of state court litigation risks "[g]ratuitous interference with the orderly and comprehensive disposition of [the] state court litigation." *Brillhart*, 316 U.S. at 495. Here, the policy of avoiding duplicative litigation would be frustrated by permitting the federal action to go forward during the pendency of the state court action since London Underwriters have raised the same issues in the state court action that they have raised in this declaratory judgment action. *See* 17A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4247 (2nd ed. 1988).

There is another policy basis favoring discretion by federal district courts that relates to the harm caused by piecemeal adjudication. In many declaratory judgment actions brought to resolve a duty to defend or indemnify an insured, there will be overlapping issues of fact or law between the state and federal actions and a judgment by either court may be *res judicata* in the other. The existence of concurrent proceedings would thus create the

potential for an unseemly and destructive race to see which forum can resolve the same issues first, which race would be prejudicial "to the possibility of reasoned decision making by either forum." *See, Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 567-68 (1983). For example, if a federal court proceeds on a declaratory judgment action, an insured may be collaterally estopped from relitigating the overlapping issues decided in the federal action. *Mitcheson*, 955 F.2d at 239; *Restatement (Second) of Judgments* § 87 cmt. a (1982). Such issue preclusion would likely "frustrate the orderly progress" of state proceedings by leaving the state court with some aspects of the case closed from further examination but still other aspects in need of full scale resolution. *Phoenix Ins. Co. v. Harby Marina, Inc.*, 294 F. Supp. 663, 664 (N.D. Fla. 1969). Additionally, the state court will likely have to consult federal law to determine application of the preclusive principles. *See Harnett v. Billman*, 800 F.2d 1308, 1312-13 (4th Cir. 1986), cert. denied, 480 U.S. 2323 (1987). Thus, collateral estoppel principles will create further entanglement.

Ongoing parallel proceedings presenting the prospect of conflicting decisions are likely to lead to duplicative effort, wasted judicial resources and serve only to confuse matters, not resolve this dispute. Thus, the sound policy of avoiding duplicative litigation was best served by the district court's declining to exercise its jurisdiction in this case.

D. The Continuing Viability of the Declaratory Judgment Action Is Not Threatened by the Failure to Apply the Colorado River/Moses H. Cone Presumption of Jurisdiction.

London Underwriters contend that the *Colorado River/Moses H. Cone* presumption of jurisdiction must be applied to a declaratory judgment action in order to assure the continuing viability of the declaratory judgment action. This contention is premised on the misplaced notion that district courts have virtually unbridled discretion to decline to entertain actions for declaratory relief unencumbered by any meaningful appellate review.⁸ Although, in the Fifth Circuit, a district court's discretion is broad, it is not unfettered. *Travelers Ins. Co. v. Louisiana Farm Bureau Federation, Inc.*, 996 F.2d 774, 778 (5th Cir. 1993). Nor is appellate review in the Fifth Circuit limited to the perfunctory review solely for bias or capriciousness suggested by London Underwriters. *See, Petitioners' Brief at pp. 14, 23.* Rather, the Fifth Circuit has set forth six nonexclusive factors, derived in part from this Court's decision in *Brillhart*, to both guide district courts in deciding abstention issues in declaratory judgment

⁸ London Underwriters are simply wrong in arguing that, under the existing Fifth Circuit standard, the mere personal disinclination of district judge to exercise jurisdiction in a declaratory judgment action due to, for example, a congested docket is unreviewable on appeal. Petitioners' Brief at pp. 14-15. The Fifth Circuit has specifically indicated that personal disinclination may not form the basis for a decision to defer the exercise of jurisdiction. *See, Travelers*, 996 F.2d at 778.

actions and to utilize in reviewing those decisions on appeal.⁹ *Travelers*, 996 F.2d at 778.

That the failure to require application of the *Colorado River/Moses H. Cone* factors to the abstention determination in a declaratory judgment action will not endanger the continuing viability of the declaratory judgment action is evidenced by this case. In its stay order in this case, the district court weighed the factors relevant to the abstention decision and set forth its specific reasons for granting the stay. J.A. 23-26. The district court's specific findings coupled with the Fifth Circuit's review of those findings under the relevant abstention factors negates the conclusion drawn by London Underwriters that the failure to apply the *Colorado River/Moses H. Cone* factors to abstention analysis in declaratory judgment actions will lead to either arbitrary abstention determinations or appellate review solely for bias or capriciousness. Indeed, in light of the specific findings made by the district court

⁹ London Underwriters complain that the six factor test formulated by the Fifth Circuit in *Travelers* does not incorporate three *Colorado River/Moses H. Cone* factors: (1) jurisdiction over real property; (2) the applicability of federal law; and (3) precedence of filing. Petitioners' Brief at p. 17, n. 18. The first two factors are not applicable in this case and the third factor actually supports abstention in light of the district court's determination that this action was filed in anticipation of litigation and as a means of forum shopping. *See § III, infra.* Moreover, in arguing that the Fifth Circuit erred in failing to apply these three *Colorado River/Moses H. Cone* factors, none of which weighs in favor of the district court's exercise of jurisdiction, London Underwriters have implicitly acknowledged that, if the courts below had expressly applied the exceptional circumstances test, abstention nevertheless would have been required.

in its stay order, the stay order would have been upheld regardless of the standard of review used and even if the *Colorado River/Moses H. Cone* factors did apply. See Sections II and III, *infra*.

Nor is there any basis for Petitioners' fear that the continuing viability of the declaratory judgment remedy is threatened by the action of the courts below in employing a *de facto* presumption that an insurer always acts preemptively in filing a declaratory judgment action any time an insured institutes a parallel state court action. Petitioners' Brief at pp. 17, 20, 23-25. The district court's specific findings that London Underwriters filed this suit "in anticipation of litigation after receiving notice of the Winkler County Verdict" and that, in filing this action, they were attempting to forum shop demonstrate that such a presumption was not employed in this case.¹⁰

E. Considerations of Federalism and Comity Cut in Favor of, not Against, Abstention in this case.

London Underwriters contend that considerations of federalism and comity compel application of the *Colorado*

River/Moses H. Cone factors to this case. In support of this argument, London Underwriters cite a series of cases decided by this Court for the general proposition that a federal court plaintiff should not be deprived of a properly invoked federal forum. Petitioners' Brief at p. 23. These cases have no applicability here for two reasons. First, they do not address the issue of discretionary abstention in cases brought under the Declaratory Judgment Act. Second, London Underwriters' claim that federalism and comity concerns compel this Court to exercise jurisdiction in this case is precluded by the fact that London Underwriters improperly invoked the federal forum through their improper utilization of a declaratory judgment action asserting nothing more than defenses to the Hill Group's state court action. *Public Service*, 344 U.S. at 248.

II. A District Court's Decision to Abstain from Exercising its Jurisdiction in a Declaratory Judgment Action Should be Reviewed Under an Abuse of Discretion Standard; Regardless of the Standard of Review Applied, However, the District Court's Stay Order was Proper.

The Declaratory Judgment Act, 28 U.S.C. § 2201, provides:

In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, *may* declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. . . .

¹⁰ The very case which London Underwriters interpret as standing for the proposition that an insurer always acts preemptively in filing a declaratory judgment action, *Continental Cas. Co. v. Robsac Indus.*, 947 F.2d 1367 (9th Cir. 1991), was not cited by either the district court in its stay order or by the Fifth Circuit on appeal. Nor does *Robsac* even hold that an insurer always acts preemptively in filing a declaratory judgment action. Rather, *Robsac* merely recognizes the fact that an insurer's declaratory judgment action can be reactive, i.e., filed in anticipation of litigation and as a means of forum shopping, even where it is the first-filed suit. *Robsac*, 947 F.2d at 1372-73.

(emphasis added). Thus, the very terms of the Act and its subsequent interpretation by the courts have made the exercise of declaratory judgment jurisdiction discretionary. *See Cardinal*, 113 S. Ct. at 1974 n. 17; *Public Service*, 344 U.S. at 241; *Brillhart*, 316 U.S. at 494-96. The reason for giving this discretion to the district court is to enable the court to make a reasoned judgment whether the investment of judicial time and resources in a declaratory action will provide worthwhile in resolving a justiciable dispute. *Minnesota Min. and Mfg. Co. v. Norton Co.*, 929 F.2d 670, 672 (Fed. Cir. 1991).

This Court has not squarely addressed the issue of whether an abuse of discretion or a *de novo* standard of review applies to the review of the exercise of jurisdiction over a declaratory judgment action. Nevertheless, this Court, in reviewing such decisions, has employed an abuse of discretion standard. *See, Cardinal*, 113 S. Ct. at 1978 (finding that an appellate court abused its discretion in failing to exercise its jurisdiction to review a declaratory judgment entered by a district court). An abuse of discretion standard is also supported by *Kerotest Mfg. Co. v. C-O Two Fire Eqpt. Co.*, 342 U.S. 180, 183-84 (1952), wherein this Court recognized that the decision whether to exercise jurisdiction over a declaratory judgment action in a situation involving the existence of concurrent jurisdiction is not susceptible to a rigid, mechanical solution, but involves a consideration of various equitable factors, and, as a result, "an ample degree of discretion" necessarily must be left to the lower court. Adopting the *de novo* review standard advocated by London Underwriters would not only be contrary to the standard previously applied by this Court, it would also eliminate the

ample discretion delegated to district courts both under the Act and this Court's prior decisions in that the discretion of an appellate court would effectively be substituted for that of the district court.

London Underwriters correctly point out that there is a split among the circuits with regard to the appropriate standard of review of a district court's decision to stay or dismiss a declaratory judgment action. Petitioners' Brief at p. 11. Drawing analogies to, *inter alia* appeals of injunctions, Petitioners argue that a district court's abstention determination in a declaratory judgment action should be reviewed *de novo* by an appellate court.¹¹ Petitioners' Brief at p. 13. At the same time, however, Petitioners concede that abstention in a declaratory judgment action should be no different from any other type of abstention recognized by this Court. Petitioners' Brief at pp. 8, 13. Accordingly, Respondents submit that, in determining the appropriate standard of review of the abstention decision in a declaratory judgment action, this Court should look

¹¹ The most appropriate of the analogies drawn by London Underwriters is the analogy to appeals of injunctions since, like a claim for declaratory relief, a claim for injunctive relief involves a discretionary, equitable remedy. However, this analogy actually supports the Hill Group's position that an abuse of discretion standard should be applied to the review of a district court's decision to entertain jurisdiction in a declaratory judgment action in that a district court's decision to grant or deny injunctive relief is reviewable under an abuse of discretion standard. *Caroline T. v. Hudson School Dist.*, 915 F.2d 752, 574 (1st Cir. 1990); *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc.*, 1995 W.L. 8240 (4th Cir. 1995); *E.E.O.C. v. Hacienda Hotel*, 881 F.2d 1504, 1519 (9th Cir. 1989); *Prows v. Federal Bureau of Prisons*, 981 F.2d 466, 468 (10th Cir. 1992), cert denied, 114 S. Ct. 98 (1993).

to the standard of review applied by appellate courts to a district court's determination of whether to abstain under the *Colorado River/Moses H. Cone, Burford, Pullman and Younger* abstention doctrines.¹²

A district court's decision to abstain under these abstention doctrines is typically reviewed for an abuse of discretion.¹³ Indeed, this Court has applied an abuse of discretion review standard to cases arising under these abstention doctrines. *See Moses H. Cone*, 460 U.S. at 19 (*Colorado River* abstention); *Harman v. Forssenius*, 380 U.S. 528, 537 (1965) (*Pullman* abstention). Similarly, the circuit courts of appeals are nearly unanimous that abstention decisions are reviewable under an abuse of discretion

¹² *See Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941) and *Younger v. Harris*, 401 U.S. 37 (1971).

¹³ There is some authority that review of an abstention decision under the *Younger* doctrine is subject to *de novo* review even though an abuse of discretion standard applies to abstention decisions under the remaining abstention doctrines. *See, e.g., Trust & Investment Advisors, Inc. v. Hogsett*, ____ F.3d ____ 1994 W.L. 706102 (7th Cir. 1994); *World Famous Drinking Emporium, Inc. v. City of Tempe*, 820 F.2d 1079, 1081-82 (9th Cir. 1987). The *Hogsett* and *World Famous* decisions applied *de novo* review to *Younger* abstention cases in light of this Court's teaching in *Colorado River* that, when a case meets the *Younger* criteria, a district court must abstain. *Colorado River*, 424 U.S. at 816 n. 22. Thus, the *Hogsett* and *Tempe* courts reasoned that applying an abuse of discretion standard where no discretion exists would be inappropriate. Since this Court has made it clear that a district court has discretion to exercise jurisdiction in a declaratory judgment action, the rationale of *Hogsett* and *World Famous*, insofar as it applies to abstention under the *Younger* doctrine, is not applicable here.

standard.¹⁴ *Villa Marina Yacht Sales, Inc. v. Hatteras Yachts*, 947 F.2d 529, 532 (1st Cir. 1991), cert. denied, 112 S. Ct. 1674 (1992) (*Colorado River* abstention); *Sheerbonnet, Ltd. v. American Express Bank, Ltd.*, 17 F.3d 46, 49 (2nd Cir. 1994), cert. denied, 115 S. Ct. 67 (1994); (*Burford* and *Colorado River* abstention); *Grode v. Mut. Fire Marine & Inland Ins. Co.*, 8 F.3d 953, 957 (3rd Cir. 1993) (*Burford, Colorado River and Younger* abstention); *Richmond, Fredericksburg & Potomac R. Co. v. Forst*, 4 F.3d 244, 250 (4th Cir. 1993) (*Burford, Younger and Colorado River* abstention); *American Bank & Trust Co. of Opelousas v. Dent*, 982 F.2d 917, 922 (5th Cir. 1993) (*Pullman* and *Burford* abstention); *Trust & Investment Advisors, Inc. v. Hogsett*, ____ F.3d ____ 1994 W.L. 706102 (7th Cir. 1994) (abuse of discretion standard of review applies to all forms of abstention other than *Younger* abstention); *Darsie v. Avia Group Int'l Inc.*, 36 F.3d 743, 745 (8th Cir. 1994) (*Colorado River* abstention); *American Int'l Underwriters, Inc. v. Continental Ins. Co.*, 843 F.2d 1253, 1256 (9th Cir. 1988) (*Colorado River* abstention); *Lind v. Grimmer*, 30 F.3d 1115, 1121 (9th Cir. 1994), cert. denied, ____ S. Ct. ____ (1994) (*Pullman* abstention); *Ramos v. Lamm*,

¹⁴ Certain cases do review *de novo* whether a given case meets the requirements of a particular abstention doctrine, reasoning that such a question is a matter of law for the court subject to *de novo* review. Nevertheless, these cases hold that, once the requirements of a particular abstention doctrine are met, a district court's abstention decision is reviewed for an abuse of discretion. *See, e.g., Sheerbonnet, Ltd. v. American Express Bank, Ltd.*, 17 F.3d 46, 48 (2nd Cir. 1994), cert. denied, 115 S. Ct. 1674 (1994); *Grode v. Mut. Fire Marine & Inland Ins. Co.*, 8 F.3d 953, 957-58 (3rd Cir. 1993); *Mission Oaks Mobile Home Park v. City of Hollister*, 989 F.2d 359, 360 (9th Cir. 1993), cert. denied, 114 S. Ct. 1052 (1994).

639 F.2d 559, 564 n. 4 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981); *Rindley v. Gallagher*, 929 F.2d 1552, 1554 (11th Cir. 1991) (*Pullman* and *Burford* abstention). Thus, in order to ensure that declaratory judgment abstention is treated uniformly with other types of abstention previously recognized by this Court, a district court's decision to abstain from exercising its jurisdiction in a declaratory judgment action should be subject to review under an abuse of discretion standard, not by *de novo* review.¹⁵

Petitioners' contention that the abuse of discretion standard employed by the Fifth Circuit leaves "litigants with no meaningful protection against the whim or personal disinclination of a district court" is misplaced. Petitioners' Brief at p. 8. As previously discussed in Section I D, *supra*, broad discretion does not equate to absolute discretion, and the Fifth Circuit has formulated at least six non-exclusive factors to be considered in determining whether abstention in a declaratory judgment action is appropriate. *See, Travelers*, 996 F.2d at 778. Thus, there simply is no basis for concluding either in this case or in general that appellate review under an abuse of discretion standard "is tantamount to no review of the abstention decision". Petitioners Brief at p. 8.

The Fifth Circuit's failure to review the district court's decision to stay by *de novo* review is not outcome

¹⁵ An analogy not suggested by London Underwriters which supports the adoption of an abuse of discretion standard is that drawn by the Fifth Circuit to the abuse of discretion standard of review applied by this Court to dismissals under the *forum non conveniens* doctrine. *See Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599, 601 n. 2 (5th Cir. 1983).

determinative of this appeal in any event. This is because the stay order would have been upheld regardless of the standard of review used. As discussed above, this Court has determined that (1) a federal court will not entertain a claim for declaratory relief where to do so would be to seize litigation from a state court merely because the state court defendant attempts to begin his defense through the filing of a claim for declaratory relief in federal court, *Public Service*, 344 U.S. at 248, and (2) a district court should not ordinarily exercise its discretion to hear declaratory judgment actions where there is another suit between the parties pending in state court that presents the same issues, not governed by federal law. *Brillhart*, 316 U.S. at 495.

De novo review of the district court's abstention order would have resulted in affirmation of the district court's stay order even disregarding the holdings in *Brillhart*, *Public Service* and their progeny. First, there is no dispute that this insurance coverage dispute is governed by state law. Second, the district court correctly concluded that Petitioners brought this action in anticipation of litigation and that entertaining jurisdiction over this declaratory judgment action would reward Petitioners' attempts to forum shop. Finally, the courts below properly recognized that declining the exercise of jurisdiction in this case would avoid piecemeal, duplicative litigation. Review of these factors by *de novo* review rather than by an abuse of discretion standard simply would not change the result. Accordingly, even if a *de novo* review standard were to be adopted, no basis would exist for reversing the Fifth Circuit's affirmation of the district court's stay order.

III. Even if the Colorado River and Moses H. Cone Factors Apply, the Trial Court Properly Addressed Those Factors in Refusing to Exercise its Jurisdiction.

Petitioners argue that the Fifth Circuit should have applied the factors set forth in *Colorado River* and *Moses H. Cone* to determine whether the stay was proper. As demonstrated above, these factors have no applicability to an action brought under the Declaratory Judgment Act. Even if the *Colorado River* and *Moses H. Cone* factors were applied in this case, however, the district court properly determined to refuse to exercise jurisdiction.

Under *Colorado River* and *Moses H. Cone*, the following factors are to be considered in determining whether to abstain from hearing a case due to the pendency of a similar state court action: (1) avoiding the exercise of jurisdiction over particular property by more than one court; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the order in which jurisdiction was obtained by the concurrent forums; (5) the applicability of federal or state law to the merits of the claims at issue; and (6) the adequacy of state court proceedings to protect the rights of the party that invoked the federal court's jurisdiction. *Moses H. Cone*, 460 U.S. at 15-16; *Colorado River*, 424 U.S. at 818-19. These factors themselves run "substantially parallel" to the criteria that historically have been deemed relevant in determining whether to accept or decline jurisdiction under the Declaratory Judgment Act. *Fuller Co. v. Ramon I. Gil, Inc.*, 782 F.2d 306, 309 n. 3 (1st Cir. 1986). Thus, to the extent these factors were to apply in this case, they likewise support the district court's refusal to exercise jurisdiction.

A. The First Colorado River/Moses H. Cone Factor, Jurisdiction Over Real Property, is Irrelevant in This Case.

The first factor set forth in *Colorado River* is not an issue in this case because there is no issue of jurisdiction over real property. Contrary to Petitioners' position, neither *Colorado River* nor *Moses H. Cone* indicate that, if one of the abstention factors set forth in those cases is absent, such absence weighs against abstention. *Employers Ins. of Wausau v. Missouri Elec. Works*, 23 F.3d 1372, 1375 n. 4 (8th Cir. 1994); *Arkwright-Boston Mfrs. Mut. v. City of New York*, 762 F.2d 205, 210 (2nd Cir. 1985). Rather, missing factors do not tip the scales against abstention. *Employers*, 23 F.3d at 1375; *Arkwright*, 762 F.2d at 210; *American*, 843 F.2d at 1257-58. Thus, the jurisdiction over real property factor is irrelevant and should not be given any consideration in the abstention analysis. *Id.*; *Lumberman's Mut. Cas. v. Connecticut Bank & Trust*, 806 F.2d 411, 414 (2nd Cir. 1986).

B. Litigating This Dispute in Federal Court is No More Convenient than Litigating This Dispute in State Court.

The second *Colorado River* factor weighs the convenience of the respective forums. *Colorado River*, 424 U.S. at 818. This factor, like the first factor, is neutral in this case because the competing forums are equally inconvenient to all parties. Respondents are each located in Dallas County, Texas. R II 105-106. Petitioners are each located in England. R II 105. As a result, litigating this dispute in federal court in Houston, Texas would be no more convenient than litigating this dispute in the Texas state courts.

See, e.g., *Arkwright*, 762 F.2d at 210 (finding the inconvenience of the federal forum factor to be inapplicable where the state and federal courthouses were across the street from one another). The convenience of the respective forums factor thus does not weigh in favor of the exercise of jurisdiction by the district court. *Employers*, 23 F.2d at 1375 n. 4. Accordingly, this factor is irrelevant and should not be given any consideration in the abstention analysis. *Lumberman's*, 806 F.2d at 414; *American*, 843 F.2d at 1257-58; *Arkwright*, 762 F.2d at 210.

London Underwriters argue that, since venue over the state court action instituted by the Hill Group was subsequently transferred to Harris County, the district court erred in staying this action in deference to the state court action. This argument overlooks the fact that venue objections to the second-filed action are properly addressed to the court with jurisdiction over the second-filed action, not the court in which the first-filed declaratory judgment action is pending. *Tempco Elec. Heater Corp. v. Omega Eng'g, Inc.*, 819 F.2d 746, 750 n. 6 (7th Cir. 1987). The question of whether venue of the state court action was proper in Travis County was simply irrelevant to the district court's determination of whether to exercise jurisdiction in this action because: (1) London Underwriters had a remedy available to them in the state court proceeding in that they were free to seek a transfer of venue; and (2) the district court would still have to address the issue of whether to exercise jurisdiction in this case or stay the case in deference to the state court proceeding instituted by the Hill Group.¹⁶

¹⁶ Petitioners' argument that the transfer of venue in the state court action from Travis to Harris County somehow indicates that the district court erroneously concluded that

C. The Piecemeal Litigation Factor Weighs in Favor of Abstention.

Colorado River abstention is concerned with wise judicial administration, conserving scarce judicial resources and facilitating the comprehensive disposition of litigation. *Colorado River*, 424 U.S. at 817. The district court's stay of this action complies with the goals of this abstention doctrine by averting piecemeal adjudication of this coverage dispute. While not specifically applying the *Colorado River* piecemeal abstention factor to the district court's stay order, the Fifth Circuit nevertheless addressed the piecemeal litigation factor and also concluded that this factor supported abstention. J.A. 30.

This determination is fully supported by the record. In the first place, the state court action is obviously the more comprehensive action in terms of the number of parties before the court in that the claims of the Hunt Group, the Hill Group's co-judgment debtors in the Winkler County litigation, against their insurers have been properly joined with the Hill Group's claims against London Underwriters. Moreover, the state court action instituted by the Hill Group is the more comprehensive of the two actions in terms of the claims presented in that it includes claims for breach of contract, declaratory relief, injunctive relief and bad faith whereas this action presents only a claim for declaratory relief.

Petitioners had not engaged in forum shopping is likewise misplaced. The forum shopping of which the Hill Group complained was Petitioners' filing a preemptive declaratory judgment action in federal court in an effort to deprive their insureds of a state court forum.

London Underwriters argue that, if the Hill Group were required to file an answer in this action, application of the compulsory counterclaim rule would result in all issues between the Hill Group and London Underwriters being before the district court below. This argument is misplaced for three reasons. First, it contravenes this Court's teaching that a federal court should not exercise jurisdiction over a declaratory judgment action where, as here, the action merely asserts a defense to an impending state court action by the declaratory judgment defendant. *Public Service*, 344 U.S. at 248. Second, this argument does little to advance London Underwriters' position that the district court erred in staying this action since maintaining virtually identical suits in two forums under these circumstances would still give rise to the concerns underlying the piecemeal litigation factor, i.e., waste of judicial resources and duplicative effort. See, e.g., *Arizona*, 463 U.S. at 565-569.¹⁷ Finally, the Hill Group's filing of an answer containing a breach of contract counterclaim would effectively moot London Underwriters' complaint for declaratory relief since declaratory relief will not be granted where a more appropriate remedy exists. *Dresser Industries, Inc. v. Ins. Co. of N. Am.*, 358 F. Supp. 327 (N.D. Tex. 1973), aff'd 475 F.2d 1402 (5th Cir. 1973); *Navistar Int'l Corp. v. Emery*, 643 F. Supp. 515 (N.D. Tex. 1986). Since the Hill Group's breach of contract claim is a more appropriate and/or effective remedy to address an actual

¹⁷ The First, Second, Eighth and Ninth Circuits have likewise recognized that piecemeal litigation occurs when different tribunals consider the same issue, thereby duplicating effort and possibly reaching different results. See, *Fuller*, 782 F.2d 309-10; *Arkwright*, 762 F.2d at 211; *Employers*, 23 F.3d at 1375; *American*, 843 F.2d at 1258.

wrong already committed, i.e. London Underwriters wrongful declination of coverage, the likely result of refusing to stay this action in favor of the state court action would have been dismissal of London Underwriters' claim for declaratory relief in favor of the Hill Group's ripened breach of contract counterclaim with the consequent result that the Hill Group would, for all practical purposes, be pursuing duplicative, piecemeal claims as a plaintiff both in this action and in the state court action.

London Underwriters next argue that judicial economy will best be served by allowing this case to proceed because the bad faith claims asserted in the state court proceeding will not be reached if London Underwriters are successful in obtaining a summary judgment in this action that no coverage exists under the policies. London Underwriters' speculative argument that they will be successful on a motion for summary judgment in the district court does not mean that judicial economy would be achieved. In fact, the opposite may be true since even if such a summary judgment were granted, the bad faith claims in the state court proceeding would not necessarily be mooted.¹⁸ Thus, judicial economy will best be served by proceeding with the more comprehensive state court proceeding in which the bad faith claims are already before the court. The district court properly recognized this in finding that its exercise of jurisdiction

¹⁸ Under Texas law, it is unclear whether a finding of policy coverage is a prerequisite to maintaining a bad faith claim. Compare *Viles v. Security Nat'l Ins. Co.*, 788 S.W.2d 566, 567 (Tex. 1990) and *Republic Ins. Co. v. Stoker*, 867 S.W.2d 74, 79 (Tex. App. - El Paso 1993, writ pending) with *Cluett v. Medical Protective Co.*, 829 S.W.2d 822, 830 (Tex. App. - Dallas 1992, writ denied.)

over this declaratory judgment action would result in piecemeal litigation.

London Underwriters further speculatively argue that judicial economy would result from the district court's exercise of jurisdiction in this case since it is "the practice in Texas to abate the claims for breach of the duty of good faith, pending resolution of the coverage issues. . ." Petitioners' Brief at p. 30. London Underwriters' contention that they are entitled as a matter of right to proceed separately on the coverage issue has been rejected by a number of Texas state courts. *See e.g.*, *All-state Ins. Co. v. Hunter*, 865 S.W.2d 189 (Tex. App. – Corpus Christi 1993, orig. proceeding); *Progressive County Mutual Ins. Co. v. Parks*, 856 S.W.2d 776 (Tex. App. – El Paso 1993, orig. proceeding).¹⁹ Indeed, the Texas Supreme Court has recognized that contractual and bad faith claims should be tried together when possible. *Arnold v. National County*

¹⁹ In fact, two of the cases cited by London Underwriters in support of their alleged right to a severance of the bad faith claims from the contractual coverage claims, *State Farm Mutual Ins. Co. v. Wilborn*, 835 S.W.2d 260 (Tex. App. – Houston [14th Dist.] 1992, no writ) and *United States Fire Ins. Co. v. Millard*, 847 S.W.2d 668 (Tex. App. – Houston [1st Dist.] 1993, original proceeding), were recently distinguished in both *Parks* and *Hunter* on the grounds that both *Wilborn* and *Millard* turned on the effect of introducing evidence of settlement offers made by the insurer which were clearly relevant to the bad faith claims but would have been prejudicial if considered in connection with the breach of contract claims. This consideration is not at issue in this case since no settlement offers were made as a result of the fact that London Underwriters' wrongfully declined coverage. Thus, there is no evidence relevant to one claim which would be prejudicial to the other claims, and a severance would not avoid prejudice, but would only serve to prolong the litigation.

Mutual Fire Ins. Co., 725 S.W.2d 165, 168 n.1 (Tex. 1987). Since a severance of the contractual coverage from the bad faith claims in the state court proceeding is not likely under the facts of this case, London Underwriters' speculative argument that judicial economy will be achieved due to an inevitable severance in the state court proceeding is without merit. Likewise, the fact that the Texas Supreme Court in *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 29-30 (Tex. 1994) recently authorized a bifurcated trial on the issue of the amount of punitive damages does not lead to the conclusion that judicial economy will be better served in the federal court system since the bifurcated trial contemplated by *Moriel* is one to be conducted immediately following a jury's determination of liability for punitive damages, not as a separate proceeding at some undetermined future date. Moreover, the bifurcation authorized by *Moriel* is designated to protect, not penalize, defendants and such bifurcation would only occur if London Underwriters asked the state court to bifurcate the trials.

Finally, London Underwriters make the unusual argument that piecemeal litigation results from the fact that they are not named as parties to the two consolidated actions pending in Dallas County between the Hill Group and an entirely separate set of insurers.²⁰ The consolidated Dallas

²⁰ At the same time London Underwriters decry the fact that they were not joined as parties to the litigation between the Hill Group and their other insurers in Dallas County, they simultaneously complain of the joinder of claims against the Hunt Group's insurers in the state court action even though the claims against the Hunt Group's insurers, like the claims against the Hill Group's other insurers in the Dallas County litigation, arise out of the same underlying lawsuits. *See* Petitioners' Brief at pp. 6, 9, 38.

County suits involve the interpretation of a number of policies which are not at issue in either this litigation or the parallel state court proceeding between the parties in this case. London Underwriters misconstrue the piecemeal litigation test by attempting to apply it to a dispute to which they are not named as parties.

The relevant inquiry faced by the district court was whether piecemeal litigation of the dispute between the parties to this action would result if jurisdiction were exercised in this case, not whether the Hill Group could have brought their claims against London Underwriters in the consolidated Dallas County actions. This point is illustrated by both *Fuller* and *Lumberman's*. Both the *Fuller* and *Lumberman's* courts, in construing the avoidance of piecemeal litigation factor, noted that the concerns raised by this factor are the avoidance of unnecessary complication and fragmentation of the trial of cases and the causing of friction between state and federal courts. *Fuller*, 782 F.2d at 310; *Lumberman's*, 806 F.2d at 414. The Dallas County litigation simply does not raise any concern of piecemeal litigation of this dispute since London Underwriters are not parties to that litigation and there is no possibility of fragmented proceedings or friction between the Dallas County state court and the federal court below. Thus, the existence of the consolidated Dallas County actions is simply irrelevant to whether piecemeal adjudication of the dispute between the parties in this case would result if the trial court had chosen to exercise its discretionary jurisdiction.

D. Petitioners' Preemptive Filing of this Action Does Not Support the Exercise of Jurisdiction in the District Court.

The fourth *Colorado River* factor, the order in which jurisdiction was obtained, also favors abstention.

Petitioners argue that the mere fact that their suit was on file first compelled the district court to exercise its jurisdiction. In *Moses H. Cone*, however, this Court made it clear that priority should not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions. *Moses H. Cone*, 460 U.S. at 21. At the time the stay order in this case was entered, the case had not progressed beyond the Hill Group's filing of their Rule 12 motion. If anything, the state court case had progressed further in that Petitioners had filed their answer in that proceeding. R I 213. In truth, however, both this case and the state court action were still in their embryonic stages at the time of the stay. Thus, this simply is not a case in which the declaratory judgment plaintiffs had devoted substantial time and energy to the litigation prior to the time the case was stayed, and the district court thus acted well within its discretion in staying the case.

There is an additional reason why the order in which jurisdiction was obtained factor favors abstention in this case. The district court specifically found that the original filing of this declaratory judgment action in December, 1992 was done in anticipation of litigation and as a means of forum shopping after London Underwriters received notice of the Winkler County verdict. J.A. 25. Where a preemptive action is filed in anticipation of litigation as a means of forum shopping, the fact that such action is the first on file weighs against, not in favor of, the district court's exercise of jurisdiction. See, *Moses H. Cone*, 460 U.S. at 21 (finding that the party initiating the second-filed action had "no reasonable opportunity" to file its suit prior to the preemptive action).

The district court's findings that this action was filed in anticipation of litigation and as a means of forum shopping were fully supported by Petitioners' admissions both in their briefing and in oral argument before the district court that it was their receipt of notice of the verdict in the Winkler County action which was the triggering event which led them to file their original declaratory judgment action. R I 220-21; R III 17. Notwithstanding these admissions, Petitioners now argue that the courts below erroneously concluded that this action was filed in anticipation of litigation and as a means of forum shopping because Petitioners denied coverage prior to the filing of their declaratory judgment action. This argument is misplaced for the reason that it was not until the time that the Winkler County jury returned its verdict and a judgment was subsequently rendered thereon that the coverage issues in this case were fully ripened.²¹ Indeed, Petitioners were in such a race to get their preemptive declaratory judgment suit on file that they did not even wait until the Winkler County court entered a judgment on the jury's verdict, thereby ripening the coverage question.²²

²¹ It is well-established Texas law that a claim for declaratory relief as to whether an insurer is obligated to indemnify its insured is premature and will not lie until such time as the insured's liability has been determined. *See Fireman's Ins. Co. of Newark, N.J. v. Burch*, 442 S.W.2d 331, 333 (Tex. 1969).

²² By contrast, the Hill Group's other insurers apparently recognized that the indemnification issue was not ripened until a judgment was entered on the jury verdict as they instituted litigation in Dallas County against the Hill Group in February, 1993, within just a couple of days after the entry of the Winkler County judgment.

Nor is the district court's decision distinguishable on the basis that the Hill Group did not "demand coverage" between the date petitioners initially denied coverage and the date London Underwriters filed their original declaratory judgment action. In the first place, the policies do not require the Hill Group to formally "demand coverage". Rather, the policies simply require the Hill Group to provide its insurers notice of a claim by sending them copies of legal papers (such as the jury verdict) received in connection with the claim. R II 23, Section IV, ¶ 2(c)(1). Second, by providing Petitioners with notice of the Winkler County jury verdict in the face of the prior declination of coverage, it was clear that the Hill Group disagreed with Petitioners' position that no coverage existed under the policies. Thus, the operative event in determining whether Petitioners' complaint for declaratory relief was filed in an effort to beat their insureds in a race to the courthouse is Petitioners' receipt of notice of the Winkler County verdict in late November, 1992, not the date upon which they wrongfully declined to provide a defense to their insureds. Indeed, the very fact that Petitioners felt it necessary to institute suit in the face of their prior declination of coverage belies their position that this situation was not a race to the courthouse.

E. There is No Significant Federal Interest in This Suit.

It is undisputed that state law governs resolution of this coverage dispute and that "no federal issues or interest are implicated in this coverage dispute." Petitioners' Brief at p. 34. Under *Colorado River* abstention analysis, the absence of federal issues may not require a district

court to surrender its jurisdiction, but it nevertheless does favor abstention where, as here, the bulk of the litigation revolves around the state law rights of the parties. *General Reinsurance Corp. v. CIGA-Geigy Corp.*, 853 F.2d 78, 82 (2nd Cir. 1988), citing *Moses H. Cone*, 460 U.S. at 23, n. 29. Moreover, in the declaratory judgment context, this Court has made it clear that when there is another suit pending in state court presenting the same issues, not governed by federal law, between the same parties, a district court's discretion to grant relief under the Declaratory Judgment Act ordinarily should not be exercised. *Brillhart*, 316 U.S. at 495. The absence of an issue of federal law in this case thus counsels in favor of the district court's decision to decline to exercise its jurisdiction.

F. Petitioners' Rights are Adequately Protected in the State Court Proceeding.

The final *Colorado River/Moses H. Cone* factor, the adequacy of the state court forum to protect the rights of London Underwriters, militates in favor of the district court's stay order. The district court, in finding that Petitioners could assert their claims in this action as defenses or counterclaims in the state court proceeding, properly recognized that London Underwriters' rights would be protected in the state court proceedings. Petitioners likewise have acknowledged that the state court is competent to resolve the legal issues presented by Petitioners' declaratory judgment action. Petitioners' Brief at p. 35. Thus, the adequacy of the state court forum factor provides no basis to support the district court's retention of jurisdiction in this case.

Notwithstanding their concession that the Texas state courts are competent to protect their rights, London Underwriters raise a myriad of alleged reasons why the district court would be a better forum in which to litigate this dispute.²³ Most, if not all, of the reasons advanced by Petitioners as to why the district court would constitute a better forum are not actually addressed to the adequacy of the state court forum. Instead, London Underwriters have set forth an exhaustive listing of the reasons behind their preference for litigating this dispute in federal court. These very same reasons are presumably what lead London Underwriters to attempt to forum shop by initiating this action as a preemptive first strike. In any event, the reasons underlying London Underwriters' preference for a federal court forum do not mean that the state court forum is inadequate to protect their rights.

London Underwriters first argue that the fact that venue over the state court proceeding was subsequently transferred to Harris County somehow compels the conclusion that the state court proceedings were inadequate to protect London Underwriters' rights. As previously discussed, the question of whether venue over the state court proceeding was proper was a matter properly addressed to the state courts and was not relevant to the district court's determination whether it should exercise jurisdiction in this case. See, *Tempco*, 819 F.2d at 750. The

²³ This, of course, is not the test under the sixth *Moses H. Cone* abstention factor, and, contrary to Petitioners' interpretation, nowhere in *Cone* did this Court indicate that the state court must be "better qualified" to handle an action in order to support abstention under this factor.

fact that the Travis County court, at the request of London Underwriters, ultimately transferred venue to Harris County, if anything, is evidence that the state courts were in fact protecting London Underwriters' rights. There simply is no basis for concluding that the fact that venue over the state court action was transferred from one county to another somehow rendered the state courts inadequate to protect London Underwriters' rights.

London Underwriters next contend that the state court proceeding is inadequate to protect their substantive rights because it may take longer than twenty-one months, the median time interval between filing and disposition for cases in the United States federal courts in the Southern District of Texas, for the state court action to get to trial. In the first place, this is not necessarily the case. It is not at all unusual for cases filed in Texas state courts to be heard within eighteen to twenty-four months of their original filing date. Moreover, in the Texas state court system, unlike the federal system, jurisdiction over civil and criminal matters is divided between civil and criminal trial courts. Speedy trial and other constitutional concerns often require that federal courts give preference to their criminal docket at the expense of their civil docket. This would not be a concern in the state court action. Thus, other than sheer speculation, there is no basis to determine whether this dispute will be reached earlier in federal court than it will in state court.

Nor do the discovery concerns raised by London Underwriters render the state court proceeding inadequate to protect their rights. In this regard, London Underwriters first contend that the need to resort to certain alleged international treaties governing foreign discovery renders the state court proceeding inadequate. However, London Underwriters cite no authority establishing that a state court is precluded from interpreting any such treaties nor any authority demonstrating any particular expertise of a federal district court in making such interpretations. London Underwriters also make the interesting argument that the federal court will better be able to protect them when they fail to make proper discovery since the Texas Rules of Civil Procedure authorize state courts to enter death penalty sanctions against a party who engages in abusive discovery tactics. Though this is a revealing admission of London Underwriters' intentions regarding discovery, such admission does little to advance London Underwriters' position since federal district courts are likewise authorized to enter death penalty sanctions against a party who fails to comply with a discovery order.²⁴ See Fed. R. Civ. P. 37(b)(2)(c).

²⁴ Texas Rule of Civil Procedure 215(2)(b)(5), by its express terms, appears to authorize an award of death penalty sanctions upon the failure of a party to comply with either a discovery order or a proper discovery request. As interpreted by Texas courts, however, before entering death penalty sanctions against a litigant for abusive discovery tactics, a trial court must first test lesser sanctions in an attempt to secure compliance, deterrence and punishment of the offender. *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 849 (Tex. 1992). Thus, in practice, there is little difference in how London Underwriters' contemplated discovery abuses will be treated under the two rules.

London Underwriters next speculatively argue that the state court forum is inadequate because they are less likely to be awarded a summary judgment under Texas state court procedural practice than they would be in federal court. While this subjective belief may explain London Underwriters' preference for a federal court forum, it hardly renders the state court forum inadequate to protect London Underwriters' substantive rights. Quite simply, alleged procedural differences under the Federal and Texas Rules of Civil Procedure do not mean that London Underwriters' substantive rights will not be adequately protected in the state court proceeding. The argument is misplaced in any event because Texas courts have not been reluctant to grant summary judgments to insurers in coverage disputes where the insurer's obligations under a policy present a matter of law for the court to determine. *See e.g., Clemons v. State Farm Fire & Cas. Co.*, 879 S.W.2d 385, 393 (Tex. App. - Houston [14th Dist.] 1994, n.w.h.); *Adamo v. State Farm Lloyd's Co.*, 853 S.W.2d 673 (Tex. App. - Houston [14th Dist.] 1993, writ denied), cert. denied, 114 S. Ct. 1613 (1994); *Maayeh v. Trinity Lloyd's Ins. Co.*, 850 S.W.2d 193 (Tex. App. - Dallas 1992, no writ); *Cluett v. Medical Protective Co.*, 829 S.W.2d 822 (Tex. App. - Dallas 1992, writ denied). There certainly is no procedural bar to London Underwriters filing their proposed summary judgment motion in the state court proceeding, and, as indicated by the above-cited cases, Texas state courts do not hesitate to grant summary judgments to deserving insurers. Accordingly, there is no basis for concluding that London Underwriters' rights will not be adequately protected in the state court proceeding.

London Underwriters' final argument that the state court proceeding is inadequate to protect their rights is

based on the fact that the claims of the Hunt Group against their insurers arising out of the Winkler County litigation are also asserted in the state court action. London Underwriters cite no authority to support their position that such a joinder of parties is improper or, even if it was, that this factor weighs in favor of the exercise of jurisdiction by the district court.²⁵ In fact, such joinder was entirely proper for the reasons discussed above. In any event, as was true of their contention that venue of the state court proceeding was improper in Travis County, London Underwriters' objections to the joinder of the claims of the Hill and Hunt Groups against their respective insurers can be remedied by filing a motion for severance and/or a motion for separate trials in the state court proceeding. London Underwriters' objections in this regard are properly addressed to the state court and do not compel the conclusion that the district court was required to exercise its jurisdiction in this case. *See, e.g., Tempco*, 819 F.2d at 750 n. 6.

²⁵ Interestingly, at the same time London Underwriters decry the fact that the claims of the Hunt Group against its insurers arising out of the Winkler County litigation have been joined in the state court action, they simultaneously take the position that the Hill Group's claims against London Underwriters should have been brought in the Dallas County litigation. *See Petitioners' Brief* at pp. 31-32. Presumably, if the Hill Group had done this, London Underwriters would then argue, as they do at page 38 of their brief, that the joinder of the bad faith claims two separate sets of insurers in the Dallas County litigation would have been prejudicial to London Underwriter, thereby entitling them to a severance in the Dallas County litigation.

CONCLUSION

For the reasons discussed herein, the Court should determine that the exceptional circumstances test has no applicability to the abstention determination in a declaratory judgment action and that a district court's decision to abstain is subject to review under an abuse of discretion standard. However, under the facts of this case, the judgment and opinion of the United States Court of Appeals for the Fifth Circuit should be affirmed in any event since, regardless of the standard of review applied, abstention was also appropriate under the *Colorado River/Moses H. Cone* exceptional circumstances test.

Respectfully submitted,

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February 13, 1995

In The

MAR 14 1995

Supreme Court of the United States
October Term, 1994

LESLIE WILTON, ON BEHALF OF HIMSELF AND AS A REPRESENTATIVE OF CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON, AND CERTAIN INSTITUTE OF LONDON UNDERWRITERS COMPANIES, AS FOLLOWS, THE ORION INSURANCE COMPANY, PLC, SKANDIA U.K. INSURANCE PLC, THE YASUDA FIRE & MARINE INSURANCE COMPANY OF EUROPE, LTD., OCEAN MARINE INSURANCE CO., LTD., YORKSHIRE INSURANCE CO., LTD., MINSTER INSURANCE CO., LTD., PRUDENTIAL ASSURANCE CO., LTD., PEARL ASSURANCE PLC, BISHOPSGATE INSURANCE LTD., HANSA MARINE INS. CO. (UK) LTD., VESTA (UK) INS. CO., LTD., NORTHERN ASSURANCE CO., LTD., CORNHILL INSURANCE CO., LTD., SIRIUS INSURANCE CO. (UK) LTD., SOVEREIGN MARINE & GENERAL INSURANCE CO., TOKIO MARINE & FIRE INSURANCE (UK) LTD., TAISHO MARINE & FIRE INSURANCE CO. (UK) LTD., STOREBRAND INSURANCE CO. (UK) LTD., ATLANTIC MUTUAL INSURANCE CO., ALLIANZ INTERNATIONAL INSURANCE CO., LTD., AND WAUSAU INSURANCE CO. (UK) LTD.,

versus

Petitioners.

SEVEN FALLS COMPANY, MARGARET HUNT HILL, ESTATE OF A. G. HILL, LYDA HILL, ALINDA H. WIKERT, AND U.S. FINANCIAL CORP.,

*Respondents.*On Writ Of Certiorari To The United States
Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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Petitioners ("Underwriters") respectfully pray that the Court will reverse the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on June 29, 1994, and order the United States District Court for the Southern District of Texas, Houston Division, to proceed to trial on the merits.

REPLY ARGUMENT

I. The Hills Confuse Discretion to Grant Relief on the Merits with Discretion to Deny Proper Federal Plaintiffs their Forum at the Jurisdictional Threshold.

The issues of discretion to abstain and discretion to grant declaratory relief are separate. To the Hills they are the same and are governed by the same considerations; if a court enjoys wide discretion to grant relief, surely, the Hills maintain, it enjoys the same wide discretion to abstain from hearing the case in the first instance. The Hills' argument, however, fundamentally misperceives this Court's prior rulings in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 20-21 & n.23 (1983), and *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 126-27 (1968).

The prime example of the misperception their Brief fosters is the Hills' substitution of the word "jurisdiction" for the italicized portion of the following quote from Professors Wright, Miller and Kane: "In the early days of the Declaratory Judgment Act there was some thought that its terms were mandatory and did not leave any discretion in the court to refuse *to give declaratory relief.*" 10A Charles A. Wright, Arthur R. Miller & Mary K. Kane, **FEDERAL PRACTICE AND PROCEDURE** § 2759 at 644 (2d ed. 1983 & Supp. 1993) (emphasis added). It appears that the Hills not only confuse nondiscretionary jurisdiction under 28 U.S.C. § 1332 with discretion to grant declaratory relief on the merits under 28 U.S.C. § 2201(a), but also seek to change leading commentators' views to suit the Hills' purposes. Except for the Fifth Circuit, even those circuit authorities in favor of broad federal court discretion to abstain under *Colorado River*,

nowhere contradict the concepts that review should be searching (if not *de novo*), and that an established test (if not *per se* the set of six *Colorado River-Moses H. Cone* factors) must be available to guide the discretion of district courts under *Brillhart v. Excess Ins. Co.*, 316 U.S. 491 (1942).

Since the considerations listed over fifty years ago in *Brillhart* have proven inadequate for the plethora of situations in which such questions arise, that basic starting point should be expanded to include the other factors relevant to most abstention decisions, just as the *Brillhart* Court anticipated it would. Transforming the fact-specific *Brillhart* considerations into factors to be weighed in the abstention equation applicable to most, if not all, declaratory judgment cases, does not require the straight-jacketing of district court discretion the Hills insist it would. Underwriters believe that guidelines based upon *Colorado River* and *Moses H. Cone*, and the additional considerations Underwriters have suggested, not only are workable, but will streamline judicial administration. Justice will certainly be served by replacing district courts' compassless, indiscriminate recitation of conclusional "findings" with firm guidelines for exactly what elements constitute valid grounds to defer to a parallel suit. A careful balancing of those factors, "heavily weighted in favor of the exercise of jurisdiction," will ensure that dismissals or stays of declaratory judgment actions are "the exception, not the rule." *Moses H. Cone*, 460 U.S. at 16; *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 812-13 (1976).

By treating *Provident Tradesmens* as having the same holding as *Brillhart*, the Hills further betray their fundamental misapprehension of the jurisdictional question to abstain. Directly contrary to the Hills' characterization, the holding in *Provident Tradesmens* instead is that there is no reason to delay indefinitely a federal plaintiff's declaratory relief pending decision of another suit in which the issue admittedly could be litigated. Concurrent jurisdiction naturally involves this sort of federal decision of state law, and occasionally, if not frequently, of dispositive fact questions. This possibility of collateral estoppel does not militate in favor of declining

jurisdiction over a proper declaratory judgment action, but instead may influence the grant of relief or how such declaration of rights is crafted. *Provident Tradesmens*, 390 U.S. at 126.

Even in affirming the stay in *Kerotest Manufacturing*, the Court emphasized that the wise administration of judicial resources was to be based on a balancing of all the equitable factors, rather than automatically preferring one party's patent-infringement action over another party's later-filed declaratory judgment action regarding patent validity. Reliance was placed on the comprehensive evaluation by the appellate court, on two occasions, that the more effective relief in that case was available in the parallel forum, rather than on some mechanical jurisdictional abstention test. *Kerotest Mfg. Co. v. C-O Two Fire Equipment Co.*, 342 U.S. 180, 183-84 (1952). See also *Cardinal Chem. Co. v. Morton Intern., Inc.*, ___ U.S. ___, 113 S.Ct. 1967, 1976-77, 124 L.Ed.2d 1, 16 (1993).

The Federal Circuit practice reviewed in the recent *Cardinal Chemical* case would determine as moot any declaratory judgment action on patent validity, when a parallel or counterclaim action determined the issue of infringement so as to extinguish the "controversy" providing federal jurisdiction. *Cardinal Chemical*, ___ U.S. at ___, 113 S.Ct. at 1971, 124 L.Ed.2d at 10. This Court determined that there was no *per se* jurisprudential basis to abstain, because a "company once charged with infringement must remain concerned about the risk of similar charges if it develops and markets similar products in the future." *Id.* at 1976-77, 124 L.Ed.2d at 16.

In requiring dismissal, the Federal Circuit had adopted the sort of presumptive abstention practice the Hills advocate here.¹ This Court, in acknowledging the possibility of cases

¹ While they linguistically sidestep (Resp. Brief 24 & n.10 and their earlier Brief of Defendants/Appellees 9 n.7 to the court below) the *de facto* presumption they have previously advocated, the practical effect of the Hills' position is still that the declaratory judgment plaintiff must overcome some burden that "[a]bsent a strong countervailing federal interest, the federal court should not elbow its way

where declaratory relief would serve no beneficial purpose after a noninfringement finding, authorized the Federal Circuit and the lower courts to abstain where the “factors in an *unusual case* might justify that Court’s refusal to reach the merits of a validity determination – a determination which it might therefore be appropriate to vacate. A finding of non-infringement alone, however, does not justify such a result.” *Id.* at 1978, 124 L.Ed.2d at 18 (emphasis added).

The Hills also entirely misstate the language of *Public Service Commission v. Wycoff Co.*, quoted at Resp. Brief 14. Underwriters contend that the Hills’ mischaracterization does the Court’s opinion considerable violence. While *Wycoff* discussed the declaratory judgment plaintiff asserting what amounts to a defense of an anticipated state court action, that discussion was related to the well-pleaded-complaint rule for federal-question jurisdiction rather than to any connection to, or impact upon the appropriateness of, the declaratory judgment remedy.² As diversity is unchallenged in this case, the cited portions of *Wycoff* are irrelevant. Resp. Brief 7 & 14. Additionally, as a matter of policy, there is no concern in this diversity case that the Declaratory Judgment Act is being misused to bring into federal court a dispute that otherwise could not be heard.³

Wycoff’s ripeness discussion is important because it intimates that *any* case that is not too conjectural for adjudication

into this controversy.” Resp. Brief 17. Underwriters respectfully submit that although the term presumption has now been abandoned by the Hills, *Colorado River* forbids such practice and that the principles of even *Brillhart* are violated. However, the Hills also can not deny that they quoted for the district court below (J.A. 18; RII 113) the presumptive language from *Continental Cas. Co. v. Robsac Indus.*, 947 F.2d 1367, 1370-71 (CA9 1991).

² *Public Serv. Comm’n v. Wycoff Co.*, 344 U.S. 237, 243 (1952).

³ Indeed, the Hills’ damages action could just as easily have been filed at first instance in federal court if they did not persist in joining in it the unrelated claims of third parties in order to defeat diversity. If Underwriters’ motion to sever is eventually granted by the Harris County court to which the state action has been transferred, removal may in fact bring this litigation back into the Southern District of Texas. A similar possibility in *Provident Tradesmens* was a cogent reason to decline abstention in that case. *Provident Tradesmens*, 390 U.S. at 126-27.

is appropriate for a declaratory judgment. While the dispute in *Wycoff* was not clearly defined and essentially not ripe, all the Court said about the Declaratory Judgment Act was that Congress could not have intended to make justiciable a conjectural question not otherwise a case or controversy within the meaning of Article III.

II. The Hills Treat Nondiscretionary Diversity Jurisdiction Differently When Suit is under the Declaratory Judgment Act.

The separation-of-powers concerns discussed in *Wycoff*, and recently in *New Orleans Public Service, Inc.*, indicate that great reticence to abstain is appropriate where the rationale does not include deference to special state administrative procedures. *New Orleans Public Service, Inc. v. New Orleans*, 491 U.S. 350, 363-64 & 368-69 (1989). This coverage dispute certainly does not involve any administrative mechanism and does not even implicate important matters of state policy.

Discretion to grant or to deny declaratory relief on the merits should not become a court-created, congressionally-unenacted special jurisdictional exception to 28 U.S.C. § 1332. Because Congress expressly intended insurers⁴ and other proper federal litigants to have available the beneficial remedy of a declaratory judgment,⁵ the court-made constraints on entertaining suit must be carefully administered.⁶

⁴ Hearings on H.R. 5623 Before a Subcomm. of the Senate Comm. on the Judiciary, 70th Cong., 1st Sess. at 46-59 (1928) (specifically listing insurance policies as one of the prime documents whose contract interpretation in a neutral federal forum the declaratory judgment mechanism was intended to facilitate). See also 10A Wright, *et al.*, FEDERAL PRACTICE AND PROCEDURE § 2760 at 658-69.

⁵ S. Rep. No. 1005, 73d Cong., 2d Sess. at 3-4 (1934); H.R. Rep. No. 1264, 73d Cong., 2d Sess. at 2 (1934); H.R. Rep. No. 627, 72d Cong., 1st Sess. at 2 (1932).

⁶ Because neither a regulation of commerce nor a policy of marine insurance is involved, Underwriters can not avail themselves on the facts existing in this particular insurance dispute of the very strong separation-of-powers arguments made by the Maritime Law Association on the abridgment of constitutionally vested admiralty jurisdiction affected by any unenacted exception to jurisdiction

Particularly because only a prudential concern for wise judicial administration is implicated in this case, avoiding congressionally mandated jurisdiction is warranted only in the "exceptional circumstances" delineated in *Colorado River* and its progeny. *Youell v. Exxon Corp.*, No. 94-7691, 1995 U.S. App. Lexis 3625 *29-30, 1995 WL 73750 *9-10 (CA2 Feb. 21, 1995).

As *amicus curiae* Insurance Environmental Litigation Association emphasizes, the judiciary must maintain a proper focus on the statutory bases of diversity jurisdiction, and on Congress' refusal to restrict it as far as some advocates urge and some judges feel is appropriate. Significant guidance is gained by examining the review of lower court jurisdictional abuses set right in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 344 (1976) and *Northbrook National Insurance Co. v. Brewer*, 493 U.S. 6, 11-12 (1989).

Underwriters recognize that removal principles and remand decisions under 28 U.S.C. § 1441 are quite different from the issues regarding the dismissal or stay of a declaratory judgment action in favor of a parallel state court suit. However, the separation-of-powers issues are identical with those concerning 28 U.S.C. § 2201(a). Compare *New Orleans Public Service, Inc.*, 491 U.S. at 368-69 with *Brewer*, 493 U.S. at 11-12.

Brewer and earlier cases restricted "prudential" bases for declining jurisdiction, while later opinions emphasized that *Thermtron Products* recognized grave constitutional implications in denying a federal forum to a proper litigant "for the amorphous reasons of 'economy, convenience, fairness, and comity' that may seem justifiable to the majority but that

over declaratory judgment actions brought pursuant to Fed. R. Civ. P. 9(h), 28 U.S.C. §§ 1331, 1333 & 1337. Brief of *Amicus Curiae* 13-17. Nonetheless, Underwriters specifically draw the Court's attention thereto, because the rule the Hills advance has even more sweeping implications for maritime commerce and marine interests than the erroneous Fifth Circuit law *amicus* attacks as already having had on admiralty and maritime cases.

have not been recognized by Congress."⁷ However, the Hills invite this Court to make just such a judicial revision to 28 U.S.C. § 1332 for any declaratory judgment action which is met with a later-filed parallel proceeding in state court. Addressing *amicus'* congressionally-conferred-jurisdiction argument, the Hills invoke Congress' "power to restrict diversity jurisdiction [which . . .] it effectively has done so by vesting the district courts with discretionary jurisdiction in declaratory judgment actions." Resp. Brief 18 n.7.

This is an even more extreme position than the presumption in favor of abstention the Hills have up to now advocated; for the Hills now assert revocation or amendment of the diversity statute by implication from the sixty-year-old enactment of a non-jurisdictional statute. Not only is the Declaratory Judgment Act merely a procedural remedy, but the legislative history of 28 U.S.C. § 2201 is also virtually silent with regard to jurisdiction. See *Hearings on H.R. 5623 Before a Subcomm. of the Senate Comm. on the Judiciary*, 70th Cong., 1st Sess. at 4 (1928).

III. "Natural Plaintiff" Status Does Not Make Insureds Forever the Masters of Coverage Litigation.

Equally unsettling as their arguments for a presumption against retaining a declaratory judgment action and for an unenacted exception to diversity jurisdiction, much of the Hills' abstention analysis has a peculiar preoccupation with their status as aggrieved insureds entitled to dictate the time, place, manner, pace, scope, and virtually the outcome of any coverage dispute. Fearful of overstating the Hills' position and intentions, Underwriters must resolutely show the facts behind the filing of the "piecemeal" litigation and the legal and equitable issues involved in the closing of the federal courthouse doors which the Hills have thus far achieved.

⁷ *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 361 (1988) (White, J., dissenting); accord *Gibson v. Berryhill*, 411 U.S. 564, 581 (1973) (stating that equity, comity, and federalism did not preclude injunction nor require abstention pending state prosecutions).

As most clearly revealed by their out-of-context construction of *Wycoff*, 344 U.S. at 248, the Hills' chief complaint is that Underwriters' declaratory judgment action too effectively presents the issue dispositive of this coverage dispute, and does so in a posture favorable to Underwriters. Resp. Brief 14. The Hills make no secret of their preference for litigating with "foreign insurers" in state court. They unabashedly admitted it to the court below.⁸

The Hills' position advances a policy requiring the district court merely to evaluate whether a declaratory judgment defendant is more naturally aligned as a plaintiff, and, if so, then it categorically deserves its indisputable choice of forum – whether it filed before the federal action or after. This is directly contrary to this Court's pronouncement in *Haworth*: "[T]he character of the controversy and of the issue to be determined is essentially the same whether it is presented by the insured or by the insurer."⁹

The Hills' improper emphasis on the claimant as "natural plaintiff" effectively denies insurers the ability ever to put "the ball into play." As this coverage dispute was not speculative from denial of defense July 31, 1992, Underwriters should not have been constrained forever to await the Hills' determination that they were finally ready to resolve this matter. RII 268 Transcript pp. 19-20. Even after the commencement of this declaratory judgment action, the Hills disavowed any intention to renew their indemnity demand for the time being, and convinced Underwriters to dismiss the action filed December 9, 1992. Only after being sued by another set

⁸ RI 170; *see also* Resp. Brief 34-35 n.16 ("preemptive" federal action "in an effort to deprive their insureds of a state court forum" is the forum shopping of which the Hills complain). This position is categorically at odds with pronouncements from this Court that the choice within one jurisdiction between federal and state fora can not implicate forum shopping, as the Hills betray they knew in trying to bring their state court suit against Underwriters in the improper venue of Travis County.

⁹ *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 244 (1937). *See also* *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941); *Nashville, Chattanooga & St. Louis Ry. Co. v. Wallace*, 288 U.S. 249, 261 (1933).

of insurers did the Hills determine the time was "ripe" to litigate this coverage dispute.¹⁰

A. Too Broad a Jurisdictional Discretion.

If the forum choice of the "natural plaintiffs" is entitled to presumptive preference, the Hills' reasoning goes, piece-meal litigation created by the after-filed state court suit implicates a waste of judicial resources; in paramount circularity, abstention is accordingly proper to avoid duplicative litigation created by the party complaining of waste. Patently, Underwriters' suit would not have been duplicative had the Hills not brought their suit in Travis County. And while a declaratory judgment will not lie simply to anticipate a defense or to establish liability in a vacuum,¹¹ both in the patent and insurance contexts the declaratory judgment is almost always sought to settle a questioned liability.¹² This practice has been unquestioned for nearly sixty years, so there is no reason why the *Colorado River* test for extraordinary circumstances in which a federal court may decline its jurisdiction should not apply as fully to declaratory judgment actions as to all other law suits brought in federal court. *Public Affairs Assocs. v. Rickover*, 369 U.S. 111, 117 (1962) (Douglas, J., concurring).

¹⁰ Resp. Brief 4 ("In light of the fact that the Hill Group's negotiations with their other insurers had fallen through and [those carriers instituted their own declaratory judgment] litigation, the Hill Group saw no point in further postponing resolution of all of their insurance coverage questions with all of their insurers."). The Hills omit that they instituted a Dallas County action against the *Patemann* parties in the 116th District Court in February 1993 and then in March 1993 haled Underwriters before a fourth court, the 299th Judicial District, Travis County, after both this declaratory judgment action had been refiled and the *Patemann* parties had a pending declaratory judgment action in the 298th Judicial District, Dallas County. RI 152-83, 193-98, 204 ¶ 7, 205 ¶ 3; RII 120-37, 139-44, 150 ¶ 3 & 5, 152-83, 204 ¶ 7, 224.

¹¹ *Green v. Mansour*, 474 U.S. 64, 72-74 (1985); *Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 484 U.S. 49, 60 (1987).

¹² 10A Wright, *et al.*, *FEDERAL PRACTICE AND PROCEDURE* §§ 2760-61 at 658-90; 6 Donald S. Chisum, *PATENTS* § 21.02[1] at 35-91 (1990) & 5-16 (Supp. 1994).

Denying jurisdiction on the basis of wise judicial administration, which lacks Article III overtones, has always been of much greater gravity than ripeness, mootness, and other procedural rules fashioned to control district courts' dockets. The convenience of the federal courts is entirely irrelevant, but nonetheless, virtually unfettered district court discretion abolishes both the right and remedy to proceed in federal court if a congested docket favors shunting the matter to the state court system, or in simply denying the determinability of the issues as was the practice reviewed in *Cardinal Chemical*.

A comparison with *Cardinal Chemical* is again instructive. Because fact-specific patent infringement is a discrete question and because "the validity issues were generally more difficult and time-consuming to resolve, the interest in the efficient management of the Court's docket might support" a rule that infringement questions should be resolved before passing on the patent's validity. *Cardinal Chemical*, ___ U.S. at ___, 113 S.Ct. at 1976, 124 L.Ed.2d at 16. However, the same considerations favoring infringement to be declared before addressing patent validity lent no support for the drastic practice under review in *Cardinal Chemical*, i.e., dismissing an alleged infringer's declaratory judgment action (or actually vacating one granted on the merits of validity), whenever the owner of the ostensibly valid patent lost an infringement counterclaim or parallel damages suit. *Id.* As discussed above, the right of the alleged infringer to obtain a declaratory judgment on the course of contemplated conduct, as well as existing uses, should not be made to wait on the patentee's decision to file another action. *Id.* at 1976-77, 124 L.Ed.2d at 17. Because of its interests in a final determination and other countervailing concerns, a proper federal litigant could not be so lightly discharged from the federal courthouse. *Id.*

The Hills argue that, like *Cardinal Chemical*'s review, current Fifth Circuit procedure is adequate to ensure that a district court does not abstain for clearly inappropriate reasons like individual bias. Resp. Brief 22-24 & n.8. Underwriters' point is not that a judge's bias against a particular litigant would escape appellate review for an abuse of discretion, but that the Fifth Circuit's

perfunctory review will rarely, if ever, provide redress when the district court's decision is phrased in virtually meaningless findings of piecemeal litigation and a race to the courthouse.¹³ Every litigant who files a second suit in state court will always perceive that it was the victim of a race to the courthouse and can always argue that maintenance of separate law suits will be duplicative and wasteful.

Describing a "rule of obeisance" as unhealthy, Judge Friendly of the Second Circuit recognized that "in these days of crowded dockets there is an inevitable risk of some degree of subconscious bias when decision whether to dismiss a case because of *forum non conveniens* is made by the judge who will have to try it if the motion is denied." Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 754 (1982). Nonetheless, such disinclination has rendered a proper declaratory judgment action merely an invitation to file a state court suit that permissively will be given preference, if not outright presumptive priority.¹⁴ In the face of busy dockets, the federal courts are routinely abdicating their responsibility to resolve

¹³ Though the *Thermtron Products* dissent implied misconduct by the district court, Underwriters here do not contend that the district courts merely "dress up" capricious rulings in language fitting applicable abstention analysis. *Thermtron Prods.*, 423 U.S. at 361 & unnumbered note (Rehnquist, J., dissenting). Rather, the district courts' congested dockets and other issues involving the courts' disinclination to hear complex commercial matters provide no foundation for a door-closing practice that deprives legitimate federal parties their choice of forum. Just as the *Thermtron Products* district court believed the interests of justice were served by the (improper) remand to the state court, and that the efficiency of its docket was also advanced, Underwriters do not challenge that the court below honestly believed abstention was appropriate. Because of the district court's faulty analysis, however, each of its findings was erroneous on the sparse evidence presented by the Hills.

¹⁴ Although the Hills reference Professor Michael T. Gibson's article in support of their position, they did exactly what he criticizes: "The 'lack of progress' factor, the laudable goal of which is to protect a court that has invested substantial time in a case, instead invites abuse [. . . and] invites a wily attorney whose client is sued in federal court merely to file immediately a countersuit in state court, along with a motion to dismiss in federal court." Michael T. Gibson, *Private Concurrent Litigation in Light of Younger, Pennzoil, and Colorado River*, 14 OKLA. CITY U. L. REV. 185, 202, 14 WL OKCULR 185 p. 23 (1989) (cited in Resp. Brief 12).

issues that are within the concurrent jurisdiction of state courts.¹⁵ Nothing distinguishes insurers' actions for declaratory relief from *forum non conveniens* and removal considerations regarding a district court's disinclination to entertain a class of litigation. Because insurers' declaratory judgment actions are usually complex cases in federal courts' already overburdened dockets, institutional rules are necessary to restrain a self-motivated exercise of discretion. It should be no more permissible to reject a declaratory judgment case where jurisdiction is clearly valid, than to remand a properly removed action because "there is no available time in which to try the above-styled action in the foreseeable future. . . ." *Thermtron Prods.*, 423 U.S. at 339. Even where the purposes of abstention are heightened, as in passing upon untried state penal statutes, deference to the state court is restricted to "narrowly limited 'special circumstances,'" not the nearly complete discretion the Hills misperceive in *Brillhart*. *Zwickler v. Koota*, 389 U.S. 241, 248 (1967); *Moses H. Cone*, 460 U.S. at 13-16.

B. Disinclination to Entertain Actions for Declaratory Relief.

Some of the increase in declaratory judgment abstentions is attributable to more dismissals and stays simply being requested, where previously litigants just resigned themselves to remaining in the federal forum. However, the receptivity of judges may also be the reason that the practice has caught on to file a parallel case and then move to stay the federal declaratory judgment proceeding. The more receptive a hearing these motions receive, the more popular they were destined to become.

¹⁵ *Thermtron Products* curtails this practice with regard to the decision to remand when the district court perceives that its heavy docket might "unjustly delay plaintiffs in going to trial on the merits of their action. This consideration, however, is plainly irrelevant to whether the District Court would have had jurisdiction of the case had it been filed initially in that court, to the removability of a case from the state court under [28 U.S.C.] § 1441, and hence to the question whether this cause was [properly remanded]." *Thermtron Prods.*, 423 U.S. at 344.

Speaking generally on *Colorado River*, not just as invoked in declaratory judgment cases, another of the Hills' cited commentators made just this point. While it is true that Mr. Davis notes "that the goal of *Colorado River* is wise judicial administration" (Resp. Brief 12), he also argued that even though *Colorado River* and *Moses H. Cone* "cautioned against overuse of the new abstention doctrine, federal courts applied the imprecise standard liberally, and often inappropriately, perhaps because of burgeoning dockets. . . . Too many times, a federal claimant's right to litigate in federal court has been denied because of a district court's manipulation of the vague test set out in those cases."¹⁶

Underwriters believe that the federal courts' disposition to avoid declaratory judgment cases chiefly on the basis of the courts' convenience is suggested by a 1992 Federal Judicial Center poll of active and senior district court judges on a whole range of "jurisdictional" proposals from raising the amount-in-controversy requirement to abolishing diversity jurisdiction entirely. More than half of the active district judges either strongly (29.1%) or moderately (21.4%) supported the proposition that federal courts should enjoy "discretionary jurisdiction in civil cases that may not warrant a federal forum." Federal Judicial Center, *Planning for the Future: Results of a 1992 Federal Judicial Center Survey of United States Judges* Q.3.08 at 29 (1994). If the majority of federal judges have a predisposition for this type of abstention and are less than enthusiastic (50.5% strongly or moderately) about hearing cases "that may not warrant a federal forum," is it any wonder that abstentions from declaratory judgment actions are increasing?

¹⁶ Howard A. Davis, *Slowing the Flow of Colorado River: The Doctrine of Abstention to Promote Judicial Administration*, 77 ILL. B.J. 648, 648-49 (1989) (reprinted verbatim at 33 TRIAL LAW. GUIDE 564 (1990), which Resp. Brief 12 cites).

IV. A “Needless” Determination of State Law is Not Implicated.

Application of only state law to a controversy is another of the Hills’ rationales for this abdication of proper jurisdiction where the district court is of the opinion that the declaratory judgment action “may not warrant a federal forum.” Federal courts routinely decide matters under state law, so that a state-law rule of decision “rarely” indicates that a state court should be allowed to decide a case, and then only on matters of public policy concern. The adjudication of even unsettled state law is – alone – never enough to warrant a federal court’s abstention. *Moses H. Cone*, 460 U.S. at 25-26 & n.33. Even when the federal adjudication will establish an issue of first impression under state law, abstention is not thereby required;¹⁷ only if the totality of the circumstances indicate that the state court more effectively can resolve the dispute between the parties should the federal litigant be deprived of a neutral federal forum’s declaration of what the state courts would do on a particular issue of state law.

One of the Third Circuit *Pullman* cases the Hills cite plainly holds: “Simple contract and tort actions that happen to involve an insolvent insurance company are not matters of important state regulatory concern or complex state interests.” *Grode v. Mutual Fire, Marine & Inland Ins. Co.*, 8 F.3d 953, 959 (CA3 1993). If the presence of a state receiver and “complex regulations relating to insolvent insurance companies” did not justify the district court’s abstention in *Grode*

¹⁷ *Provident Tradesmens*, 390 U.S. at 126-27 (preempting the underlying tort suits, on the attendant factual determination of entrustment, did not justify denying a coverage determination of “permission” under the automobile policy; reversing the *en banc* appellate court’s incorrect “dismissal as an unwarranted intrusion upon state adjudication of state law”). Certification of a truly important question of state law is also authorized under Tex. R. App. P. 114(a), though Underwriters note that neither this nor similar procedures are available “as a convenient way to duck [the court’s] responsibility in OCSLA or diversity jurisdiction,” to determine difficult state law questions. *Transcontinental Gas Pipeline Corp. v. Transportation Ins. Co.*, 958 F.2d 622, 623-24 (CA5 1992). See generally Note, *Abstention and Certification in Diversity Suits: “Perfection of Means and Confusion of Goals,”* 73 YALE L.J. 850 (1964).

under any of the four abstention doctrines, certainly mere insurance contract interpretation requested in this case under Texas law falls short of the “difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result” as between the parties. *Colorado River*, 424 U.S. at 814. Only unsettled principles of state law bearing upon public policy issues should not be “needlessly” interfered with, so Underwriters suggest that all the Hills’ protestations are misplaced on the need for state adjudication of this case’s insurance questions.

V. To the Extent Texas Insurance Law is Relevant to the Abstention Considerations in this Case, the Hills Misstate the Applicable Principles and the Lessons to be Drawn.

The Hills first make a convoluted realignment-mootness argument that because the dispute has now ripened into a full-blown contract claim, Underwriters’ request for declaratory relief is moot, and contractual determination of damages on their “ripened breach of contract counterclaim,” “to address an actual wrong already committed,” is such that the Hills would “for all practical purposes, be pursuing duplicative, piecemeal claims as a plaintiff both in this action and in the state court action.” Resp. Brief 37-38. However, neither of the two Northern District of Texas cases the Hills cite¹⁸ have any

¹⁸ *Navistar Intern. Corp. v. Emery*, 643 F. Supp. 515, 517 (N.D. Tex. 1986); *Dresser Indus., Inc. v. Insurance Co. of North Am.*, 358 F. Supp. 327, 330 (N.D. Tex.), aff’d, 475 F.2d 1402 (CA5 1973) (table). The latter case, which pre-dates *Colorado River*, is simply irrelevant. The former decision to dismiss a contract declaratory judgment action brought by the alleged party in breach, was premised on the more comprehensive nature of the trucking company’s state court suit for “antitrust violations under Texas law, breach of contract, tortious interference with contract, and conspiracy” with third parties. As the parallel federal and state actions were filed the same day, there was no discussion of the “ripening” of the breach-of-contract claim “mooting” the right to a determination whether a valid contract bound the parties. *Navistar*, 643 F. Supp. at 516-17. The prescriptive discussion in *Navistar* concerned whether to stay the federal declaratory judgment proceeding pending resolution of the other suit, or to dismiss the federal action outright. The

suggestion of realignment of parties, nor do they, or any Texas authority of which Underwriters are aware, stand for the proposition that a "ripened" contract claim moots a declaratory judgment request for an interpretation of an allegedly breached contract as "an actual wrong already committed."¹⁹

The outright disingenuousness of the Hills' argument is betrayed by the course of proceedings on the other insurers' declaratory judgment action filed in the 298th Judicial District, Dallas County, long after these Underwriters filed their original federal suit. Upon service of the *Pateman* petition February 23, 1993, the Hills filed their own damages action in the 116th Judicial District,²⁰ substantively identical to the Travis County suit they would later file against Underwriters. Within a week of filing their separate suit and submitting an Injunction Hearing Brief to the 116th Judicial District Court, the Hills' damages and injunctive case was consolidated in the 298th Judicial District Court with the previously filed

Navistar rationale was not that a "ripened" cause of action for breach of contract moots a request for a declaratory judgment concerning that contract, but that "under Texas law, a Texas state court cannot issue a declaratory judgment when a Federal Court has jurisdiction over the case, even when that Federal Court has stayed proceedings," allegedly because it would be rendering an advisory opinion. *Id.* at 517 (citing *United Services Life Ins. Co. v. Delaney*, 396 S.W.2d 855, 856 [859-63] (Tex. 1965), which Underwriters suggest is no longer good law). While nothing Underwriters know of Texas declaratory judgment practice then or now would prevent a court going forward on a breach-of-contract claim for damages when another venue was, or had been, asked to declare the validity of a contract, the principles involved are issue preclusion and *res judicata*. Until collateral estoppel adheres to a valid determination by judgment between the identical parties by a competent tribunal, nothing in Texas statutory or case law prevents a state court from entertaining breach-of-contract claims because of the pendency of a declaratory judgment action in federal court.

¹⁹ See *BHP Petroleum Co., Inc. v. Millard*, 800 S.W.2d 838, 842 (Tex. 1990); see also Tex. Civ. Prac. & Rem. Code Ann. § 37.004, Annotations 17-23, at 435-38 (Vernon 1986) & at 97 (Vernon Supp. 1995).

²⁰ See footnote 10, *supra* page 9, and footnotes 4-7 of the original Brief of Petitioners, pp. 4-6. The Hills also gave Underwriters notice of intent to file February 23, 1993, pursuant to the January 22, 1993 letter agreement with Underwriters. J.A. 4 & 24; RII 141 ¶ 1.

Pateman action, though the *Pateman* declaratory judgment action sought no monetary damages, invoked no legal claim or coercive remedy, and requested no injunctive or equitable relief. Appendix, *infra*, SA-1. As *Pateman* was – and is – no more than a request for declaratory relief, the Hills clearly are wrong that Texas practice requires that their breach-of-contract and other claims supplant a declaratory judgment action for construction of the same insurance contract.²¹ If the Texas Supreme Court authority invoked by the Hills holds what the Hills here erroneously suggest it does, consolidation in the 298th Judicial District would not only have been inappropriate, it would have been impossible.

A corollary to the Hills' idea that "an actual wrong already committed" "ripens" so as to "moot" a request for declaratory relief is that Underwriters' declaratory judgment filing was "premature" because no judgment had been rendered by the Winkler County court at the time these Underwriters filed their action December 9, 1992. In supposed contrast to the other group of insurers the Hills have sued in Dallas County, Underwriters allegedly were so anxious to get off the starting line that they filed the original December 9, 1992 declaratory judgment action prematurely, before any coverage claim had ripened because of an adverse judgment, rather than just a jury verdict.²²

²¹ See the Hills' Brief of Defendants/Appellees 5 & n.3 (citing *Abor v. Black*, 695 S.W.2d 564, 566 (Tex. 1985) ("Recognizing that the 298th Judicial District court lacked jurisdiction to hear the declaratory judgment action filed by the Hill Group's other insurers in light of the fact that the Hill Group had ripened breach of contract and other claims," the Hills filed a separate action originally lodged with the 116th Judicial District). But this second suit, the Hills are reticent to admit, was consolidated with the pending *Pateman* litigation in the 298th Judicial District Court, though that court supposedly lacked jurisdiction because the contract interpretation sought had allegedly "ripened" into an "actual wrong already committed."

²² Resp. Brief 42 & nn. 21 & 22. The cited case itself holds that the declaratory judgment was fully justiciable on the issue of a duty to defend the husband. *Firemen's Ins. Co. v. Burch*, 442 S.W.2d 331, 332 (Tex. 1968). What was considered too hypothetical for a declaratory judgment was if the wife were held liable to the third party, could the third party claim against the husband, and in that event would the insurer be responsible for defense and indemnity of an action by

However, the Hills' argument raises the specter of no declaratory judgment ever being proper. Their argument is that until a judgment on the insured's liability has been entered, a coverage dispute is not "ripe"; once a judgment is entered on a verdict against the insured, denial of coverage is "an actual wrong already committed," so that the "ripened" claim should be brought as a breach-of-contract action by the putative aggrieved party, rather than as a declaratory judgment action by the alleged wrongdoer. The palpable fallacy in the Hills' conundrum needs no further refutation than the rejection of similar arguments by the Dallas County court in which the other insurance actions have been consolidated.

The Hills also contest Underwriters' point that summary judgment procedures under the Texas Rules of Civil Procedure make it doubtful whether even the straightforward contract interpretation of policy terms will be ruled upon by the Harris County court as a matter of law. Rather than to respond to Underwriters' argument that the practice in Texas is to allow all fact issues to go to the jury, even if policy interpretation is suitable for determination as a matter of law, the Hills merely recite that there is no procedural bar to submission of a summary judgment motion and that several cited (but unanalyzed) cases indicate that "Texas state courts do not hesitate to grant summary judgments to deserving insurers." Resp. Brief 48.

Underwriters too could offer an unhelpful list of all the Texas cases where summary judgments have been denied on account of an allegedly disputed issue of material fact. However, the point is not whether summary judgment would be granted by a federal court, but that the procedural rules of the state court treat insurance policy interpretation so as virtually to foreclose summary judgment. On that point, Underwriters would again direct the Court's attention to the authoritative discussion of how Texas practice differs from federal summary judgments in David Hittner, Lynne A. Liberato & Bruce

the third party to collect from the vicariously liable husband. *Burch*, 442 S.W.2d at 333-35.

R. Ramage, **SUMMARY JUDGMENTS AND DEFAULTS IN THE STATE COURTS OF TEXAS** § I at 56-58 (1992).

Finally, Underwriters object strenuously to the Hills' canard that a legitimate concern for protecting trade secrets and financial information "is a revealing admission of London Underwriters' intentions regarding discovery." Resp. Brief 47. The point is that the federal courts are institutionally better equipped and structurally more effective at protecting the rights of foreign litigants; the advantage is identical to the issues concerning special admiralty-practice procedures raised by *amicus curiae* Maritime Law Association regarding the Supplemental Rules for Certain Admiralty and Maritime Claims and Fed. R. Civ. P. 4(k)(1)(B) & 9(h). This procedural advantage is complemented by a greater competence than displayed by state courts in following the United States' bilateral and international commitments with regard to trans-national discovery and litigation; it also extends to greater overall sensitivity to comity and other concerns when international transactions are being adjudicated.

With regard to numerous procedural advantages and otherwise, Underwriters have established that the litigation with the Hills is better conducted in federal court. *See Brillhart*, 316 U.S. at 495 (the district court is required to "ascertain whether the questions in controversy . . . can **better** be settled in the proceeding pending in the state court"). Accordingly, it was an abuse of the district court's discretion to stay this cause in favor of an improper venue in which piecemeal litigation was deliberately created by the Hills.

VI. Standard of Review.

The Hills' final platitude is that "broad discretion does not equate to absolute discretion"; they assert that the Fifth Circuit's review was more than cursory. Resp. Brief 30-31. On the standard-of-review question presented in this case, any deference due a district court's abstention decision in *Younger* and *Pullman* contexts, Underwriters respectfully suggest, is not so great as the Hills imply; but in any event it would be more than in a declaratory judgment dismissal or stay because

wise judicial administration is a weaker foundation for abstention than deference to state determination of state public policy in the first instance. *Gordon v. Luksch*, 887 F.2d 496, 498 (CA4 1989) ("judicial diseconomy alone does not justify abstention"). While leaving to the Court's interpretation the appropriate scrutiny given on appeal to the decision to abstain under other doctrines, Underwriters do believe this Court's and the majority of circuits' review of *Younger*, *Pullman*, and *Burford* decisions is *de novo* or "plenary." See *Sheerbonnet, Ltd. v. American Express Bank Ltd.*, 17 F.3d 46, 48 (CA2), cert. denied, ___ U.S. ___, 115 S.Ct. 67, 130 L.Ed.2d 23 (1994); *University of Maryland v. Peat Marwick Main & Co.*, 923 F.2d 265, 269-70 (CA3 1991).

CONCLUSION

In the interests of justice, and for all the foregoing reasons and those Underwriters previously asserted, the Court should reverse the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, and order the United States District Court for the Southern District of Texas, Houston Division, to proceed to trial on the merits.

Respectfully submitted,

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and Certain Member Companies of
the Institute of London Underwriters

NO. 93-1658-M
(Consolidated with No. 93-1929)

RONALD MALCOLM PATEMAN, et al.,	§	IN THE DISTRICT COURT
Plaintiffs,	§	
VS.	§	
MARGARET HUNT HILL, individually, et al.,	§	
Defendants.	§	
MARGARET HUNT HILL, et al.,	§	
Plaintiffs,	§	
VS.	§	
RONALD MALCOLM PATEMAN, et al.,	§	298th JUDICIAL DISTRICT
Defendants.	§	

ORDER OF CONSOLIDATION

On this date the Court considered the Order of Consolidation proposed by Margaret Hunt Hill, et al., Defendants in Cause No. 93-1658 and Plaintiffs in Cause No. 93-1929. The Court is of the opinion that the proposed Order is well taken and shall become an Order of this Court.

IT IS, THEREFORE, ORDERED that the case styled *Margaret Hunt Hill, et al. v. Highlands Insurance Company, et al.*, Cause No. 93-1929-F pending in the 116th District

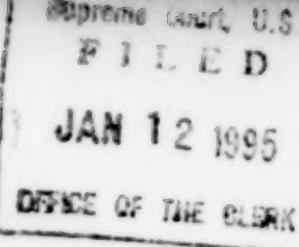
Court is hereby transferred to this Court and consolidated with Cause No. 93-1658-M, entitled *Ronald Malcolm Pateman, et al. v. Margaret Hunt Hill, et al.*

[p. 2]

SIGNED this the 1 day of March, 1993.

/s/

JUDGE PRESIDING



In The
Supreme Court of the United States
October Term, 1994

◆
LESLIE WILTON, ET AL.,

Petitioners,
versus

SEVEN FALLS COMPANY, ET AL.,

Respondents.

◆
**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit**

◆
**BRIEF OF AMICUS CURIAE
MARITIME LAW ASSOCIATION
IN SUPPORT OF PETITIONERS**

◆
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No. 94-562

In The

Supreme Court of the United States

October Term, 1994

LESLIE WILTON, ET AL.,

Petitioners,

versus

SEVEN FALLS COMPANY, ET AL.,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit

BRIEF OF AMICUS CURIAE
MARITIME LAW ASSOCIATION
IN SUPPORT OF PETITIONERS

The Maritime Law Association of the United States ("MLA") respectfully submits this brief as *amicus curiae* in support of Petitioners, Leslie Wilton, et al. Both Petitioners and Respondents have consented to the MLA's participation, and copies of the letters conveying such consent are being filed with the Clerk of the Court simultaneously with the submission of this brief.

INTEREST OF AMICUS CURIAE

The MLA has a strong interest in the disposition of this case. The MLA is a nationwide bar association, founded in 1899, and incorporated in 1993. It has a membership of more than 3,500 members, primarily attorneys practicing maritime law. It is affiliated with the American Bar Association and is represented in that Association's House of Delegates.

The MLA's attorney members, most of whom are specialists in admiralty law, represent all maritime interests – shipowners, charterers, cargo owners, shippers, forwarders, port authorities, seamen, longshoremen, stevedoring companies, passengers, marine insurance underwriters and brokers and other maritime plaintiffs and defendants.

The MLA's purposes are stated in its Articles of Incorporation:

The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, *to promote uniformity in its enactment and interpretation*, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comite Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

(Emphasis added.)

In furtherance of these objectives the MLA, during the ninety-six years of its existence, has sponsored a wide range of legislation dealing with maritime matters, including the Carriage of Goods by Sea Act¹ and the Federal Arbitration Act.² The MLA has also cooperated with congressional committees in the formulation of other maritime legislation.³

The MLA is also participating in several projects of a maritime legal nature undertaken by agencies of the United Nations, including its Commissions on Trade Law ("UNCITRAL") and Trade and Development ("UNCTAD"). It works closely with the International Maritime Organization ("IMO").

The MLA has actively participated, as one of some fifty national maritime law associations constituting the Comite Maritime International,⁴ in the movement to

¹ 46 U.S.C. §§ 1300-1315.

² 9 U.S.C. §§ 1-16.

³ E.g., 1972 Water Pollution Control Act Amendments, 33 U.S.C. §§ 1251-1376; implementation of the 1972 Convention for Preventing Collisions at Sea, 28 U.S.T. 3459, T.I.A.S. 8587, U.N.T.S. 15824, as amended, T.I.A.S. 10672, *reprinted in* 6 BENE-DICT ON ADMIRALTY, Doc. No. 3-4 (7th rev'd ed. 1993) (hereinafter "BENEDICT"), *see* 33 C.F.R. ch. 1, subch. D, Special Note, at 160 (1987); United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2073.

⁴ These now include the national associations of Argentina, Australia and New Zealand, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Croatia, Denmark, Egypt, Finland, France, Germany, Greece, Hong Kong, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, D.P.R. Korea, Mexico, Morocco, The Netherlands, Nigeria, Norway, Panama, Peru, Philippines, Poland, Portugal, Russian Federation, Sene-

achieve maximum international uniformity in maritime law through the medium of international conventions.⁵

The MLA believes uniformity in maritime law, both national and international, is essential. Concern for uniformity has been repeatedly expressed by our membership and standing committees. For example, in 1975 the MLA Standing Committee on Uniformity of U.S. Maritime Law recommended that steps be taken to persuade congressional committees "that nationwide and, in fact, world-wide uniformity in the Maritime Law is highly desirable, not only from the standpoint of those involved with maritime commerce but from that of the public as well." A resolution to that effect was unanimously adopted at the MLA Annual Spring Meeting on April 25, 1975.⁶ A substantially identical resolution was adopted by the American Bar Association in 1976. This policy has been reaffirmed by the MLA on several occasions, most recently in a 1986 resolution.⁷

gal, Singapore, Spain, Sri Lanka, Sweden, Switzerland, Turkey, Ukraine, United Kingdom, United States, Uruguay and Venezuela.

⁵ E.g., *Assistance and Salvage* (1910), 37 Stat. 1658 (1913), reprinted in 6 BENEDICT, Doc. No. 4-1; *Ocean Bills of Lading (The Hague Rules)* (1924), 120 L.N.T.S. 155, reprinted in 6 BENEDICT, Doc. No. 1-1; *Collision* (1910), reprinted in 6 BENEDICT, Doc. No. 3-2; *Limitation of Liability of Owners of Sea-Going Ships* (1957), reprinted in 6 BENEDICT, Doc. No. 5-2; *Maritime Liens and Mortgages* (1967), reprinted in 6C BENEDICT, Doc. No. 15-5; *Civil Liability for Oil Pollution Damages* (1969), U.N.T.S. 1409, reprinted in 6 BENEDICT, Doc. No. 6-3; and *Limitation of Liability for Maritime Claims* (1976), reprinted in 6 BENEDICT, Doc. No. 5-4.

⁶ MLA Minutes, MLA Doc. No. 588 at 6397-98 (1975).

⁷ MLA Minutes, MLA Doc. No. 669 at 8769 (1986).

The MLA has, in furtherance of the uniformity policy and resolutions, filed *amicus* briefs in a number of cases, including a number of briefs accepted by this Court.⁸ It is the policy of the MLA to file briefs as *amicus curiae* only when important issues of maritime law are involved or the Court's decision may substantially affect the uniformity of maritime law.

Such a situation exists in this case which involves critical issues regarding the Declaratory Judgment Act. Declaratory judgments are an important tool in promoting uniformity of U.S. maritime law, and excessive abstention invites and endorses forum shopping and unpredictability in an area in which consistency is essential.

Apart from the inherent problems arising from uncertainty in the application of a federal door-closing measure, there is the risk that state courts will disregard other elements of admiralty law. See, e.g., *Green v. Industrial Helicopters, Inc.*, 593 So.2d 634 (La.), cert. denied, ___ U.S. ___, ___ (1992) (applying state strict liability statute to maritime tort). Moreover, the federal courts make and are best suited to enforce U.S. maritime law. Accordingly, the choice of plaintiffs to seek a declaration of their rights under U.S. maritime law in federal court should be

⁸ E.g., *Sisson v. Ruby*, 497 U.S. 358 (1990); *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988); *Offshore Logistics, Inc. v. TalleNTire*, 477 U.S. 207 (1986); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973). For a more comprehensive listing, see *MLA Report*, MLA Doc. No. 671 at 8862-63 (1987).

respected. In contrast, a proliferation of chaotically different results arising out of the same factual settings adversely affects the doctrine of uniformity and consequently the practices of the MLA members and the affairs of their clients.

STATUTES INVOLVED

United States Constitution, art. III, § 2[1].

The judicial Power [of the United States] shall extend . . . to all cases of admiralty and maritime jurisdiction . . . [and] between Citizens of different states. . . .

28 U.S.C. § 2201(a). Declaratory Judgment Act.

In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Federal Rule of Civil Procedure 4(k)

(1) Service of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant

* * *

(B) who is a party joined under Rule 14 or Rule 19 and is served at a place within a judicial district of the United States and not

more than 100 miles from the place from which the summons issues. . . .

SUMMARY OF ARGUMENT

"[F]ederal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred . . . [and] have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution." *New Orleans Public Service, Inc. v. New Orleans*, 491 U.S. 350, 358, 109 S. Ct. 2506, 2512, 105 L. Ed. 2d 298, 310 (1989) (quoting *Cohens v. Virginia*, 6 Wheat. 264, 404, 5 L. Ed. 257 (1821)). Maritime interests regularly invoke federal jurisdiction, seeking a remedy affirmatively guaranteed by Congress in the Declaratory Judgment Act ("the Act"), pursuant to constitutionally granted maritime jurisdiction. Lower courts have effectively denied these interests both their right to be in federal court, and the remedy which Congress has affirmatively supplied, ignoring legislative intent, and violating the constitutionally mandated separation of powers between the legislature and the judiciary.

The Declaratory Judgment Act is intended to permit litigants an opportunity for judicial intervention before uncertainty regarding rights and obligations escalates into an affirmative breach of duty. Neither the Act itself, nor anything in its legislative history, permits a court having jurisdiction over the parties and issues to decline to hear a declaratory judgment suit. The district court's

decision to defer to a parallel state court action violates the purpose of the Act, and the clear intent of its framers.

District courts have not been afforded discretion to decline declaratory judgment cases, merely because it is more convenient to do so. The history of the Act, and its remedial nature, require federal courts to provide litigants, particularly maritime litigants, their day in court. The district court's discretion to abstain can only be exercised in light of the court's unflagging obligation to exercise jurisdiction. Only exceptional circumstances will justify abdication of valid jurisdiction. See *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *Colorado River Water Conser. Dist. v. United States*, 424 U.S. 800 (1976).

The Fifth Circuit's deference to the unfettered discretion of the district court has effectively obliterated a legislatively crafted remedy for maritime interests and for marine insurers in particular. The district court's "second in time preference" eliminates the efficacy of the Declaratory Judgment Act and penalizes any litigant who attempts to avail itself of the protections of the Declaratory Judgment Act before a dispute ripens into litigation. These decisions are contrary to the important principle of uniformity in maritime law, and remove maritime cases from the courts with the most experience and expertise to decide them.

ARGUMENT

I. The federal Declaratory Judgment Act has been a vehicle traditionally utilized by maritime interests in a variety of settings.

By its very nature, maritime commerce is transient. Vessels travel from port to port, state to state, country to

country. Seaman are injured, cargo is damaged, vessels collide in different ports, different states, and different countries. In a marine disaster, seamen from many different states or countries may be injured; oil or other cargo may be spilled, affecting the coastlines of several states; cargo belonging to interests both foreign and domestic may be damaged; a variety of insurance policies, both marine and non-marine may be implicated, placing at risk both foreign and domestic underwriters. Traditionally, in attempting conclusively to determine rights and remedies in the face of a marine disaster or a simple personal injury, admiralty interests have resorted to the federal courts, where Congress and the Constitution have expressly provided specific jurisdiction over matters maritime. These interests approach the federal court, frequently using the vehicle of the federal Declaratory Judgment Act, seeking a determination (i) of whether maintenance and cure is owed, or whether a seaman has reached maximum cure;⁹ (ii) of general average;¹⁰ (iii) of

⁹ *Rowan Companies, Inc. v. Griffin*, 876 F.2d 26, 28 (CA5 1989); *Lady Deborah Inc. v. Ware*, 855 F. Supp. 871 (E.D. Va. 1994); *Franklin v. Diamond Offshore Management Co.*, 1994 WL 144288 (E.D. La., Apr. 18, 1994) (Civ.A.No. 93-3940); *First Shipmor Assn v. Musa*, 1993 A.M.C. 2007 (N.D. Cal. 1993); *Rowan Companies, Inc. v. Meyers*, 1993 WL 218239 (E.D. La., June 14, 1993) (Civ.A.No. 93-1330); *Great Lakes Dredge and Dock Co. v. Ebanks*, 1994 WL 703489 (S.D. Ga., Nov. 28, 1994) (Civ.A.No. CV294-109).

¹⁰ *Ceramic Corp. of America v. Inka Maritime Corp. Inc.*, 1 F.3d 947 (9th Cir. 1993); *Waterman Steamship Corp. v. Chubb & Son, Inc.*, 1994 WL 50233 (E.D. La. 1994); *Insurance Co. of North America v. S/S CTE Rocio*, 1992 A.M.C. 2568 (S.D. N.Y. 1992).

limitation of liability;¹¹ (iv) of coverage or non-coverage under a marine insurance policy;¹² and (v) of the parties' rights regarding a maritime contract unrelated to insurance.¹³

It is not uncommon for an entity with an interest in a maritime disaster, be it an underwriter, a vessel owner, a ship charterer or an injured seaman, to file a pre-emptive suit, invoking the protections of a federal forum before a ship can sail away, even without knowing whether the

vessel or the vessel owner has any liability. Frequently, when vessels collide, or a vessel breaks apart, months will pass before any conclusive determination of fault can be made. Similarly, where injured seamen are paid maintenance and cure, the point at which the seaman reaches maximum cure is frequently disputed. Because of the transient nature of the marine industry, it is often necessary to obtain witness statements or depositions of crew members before a vessel leaves port, and U.S. waters.

This "pre-emptive strike" is an accepted, and acceptable, phenomenon in the world of maritime commerce. Frequently, it is the only way to obtain and maintain jurisdiction over a foreign shipowner whose vessel has caused damage in a U.S. port. The Declaratory Judgment Act provides litigants with an affirmative federal remedy to be used before a potential breach of contract ripens into an actual breach of contractual duty. See *Rowan Cos., Inc. v. Griffin*, 876 F.2d 26, 28 (CA5 1989); see also S. Rep. No. 1005, 73d Cong., 2d Sess., at 3 (1934). The Declaratory Judgment Act traditionally has been a vehicle used by maritime insurers to avoid the potentially severe ramifications of denying an insured's claim, when valid grounds for doing so were present. See, e.g., *Granite State Ins. Co. v. Tandy Corp.*, 986 F.2d 94, 97 & n.5 (CA5), cert. granted, ___ U.S. ___ 113 S.Ct. 51 (1992), cert. dism'd, ___ U.S. ___ 113 S.Ct. 1836 (1993); *Rowan Cos.*, 876 F.2d at 28; *American Mfrs. Mut. Ins. Co. v. Edward D. Stone, Jr. & Ass.*, 743 F.2d 1519 (CA11 1984); see also CHARLES A. WRIGHT, LAW OF FEDERAL COURTS §100, at 672 (1983); EDWIN BORCHARD, DECLARATORY JUDGMENTS 634-80 (2d ed. 1941). The courts below have effectively penalized litigants for "racing to the courthouse," disenfranchising parties who, for

¹¹ *Sisson v. Ruby*, 497 U.S. 358 (1990); *Odeco Oil and Gas Co.*, 4 F.3d 401 (5th Cir. 1993); *Doucet & Adams, Inc. v. Hebert*, 1993 WL 8623 (E.D. La., Jan. 6, 1993) (Civ.A.No. 92-2375); *Complaint of Bird*, 794 F. Supp. 575 (D. S.C. 1992).

¹² See *Sirius Ins. Co. (UK) Ltd. v. Collins*, 16 F.3d 34 (2d Cir. 1993); *Granite State Ins. Co. v. Tandy Corp.*, 986 F.2d 94 (5th Cir. 1992); *Northwestern Nat. Ins. Co. v. Federal Intermediate Credit Bank of Spokane, Wash.*, 839 F.2d 1366 (9th Cir. 1988); *Windsor Mount Joy Mut. Ins. Co. v. Giragosian*, 864 F. Supp. 239 (D. Mass. 1994); *Homestead Ins. Co. v. Kim Hung, Inc.*, 1994 WL 518261 (E.D. La., Sept. 22, 1994) (Civ.A.No. 93-3677); *Newark Ins. Co. v. Blaire*, 1194 A.M.C. 1061, 1994 WL 4410 (S.D. N.Y., Jan. 3, 1994) (No. 92 Civ. 1648); *Homestead Ins. Co. v. Woodington Corp.*, 1993 A.M.C. 1552 (E.D. Va. 1992); *El Fenix de Puerto Rico v. Serrano Gutierrez*, 786 F. Supp. 1065 (D. P.R. 1991); *Washington International Ins. Co. v. Mellone*, 773 F. Supp. 189 (C.D. Cal. 1990).

¹³ *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313 (5th Cir. 1990); *Maritime Overseas Corp. v. Ebner*, 697 F.2d 701 (5th Cir. 1983); *Luckenbach S.S. Co. v. U.S.*, 312 F.2d 545 (2d Cir. 1963); *Great Lakes Dredge and Dock Co v. Ebanks*, ___ F.Supp. ___ 1004 WL 703489 (S.D. Ga. 1994); *Flagship Group, Ltd. v. Peninsula Cruise Inc.*, 771 F. Supp. 756 (E.D. Va. 1991); *Toxotix Compania Naviera, S.A. v. Shipalks Shipping A.G. Zug, Switzerland*, 1990 WL 63779 (S.D. N.Y. May 10, 1990) (No. 88 CIV 7308).

valid reasons, seek affirmatively to avail themselves of the protections of the federal forum.

II. A federal court with maritime jurisdiction may not defer to a later-filed state court action, merely because of the pendency of a state court action.

The rulings of the courts below eviscerate the affirmative remedy provided by Congress in the Declaratory Judgment Act and ignore the clear congressional intent to provide litigants with a federal forum to resolve issues such as those presented in traditional maritime litigation.

A. Deference to a later-filed state court action is contrary to congressional intent and the affirmative character of the Declaratory Judgment Act.

Marine underwriters, unsure of their rights and duties under policies of marine insurance, frequently attempt to invoke the affirmative protection of the federal court.¹⁴ More often than not, these federal actions are stayed, at the whim of the district judge, pending resolution of the later-filed state court action. This eviscerates the affirmative nature of the remedy provided by Congress, effectively abolishing the Declaratory Judgment Act and leaving marine underwriters without a federal remedy.

Deference to a later-filed state court action, simply because another forum is available, is inconsistent with

¹⁴ See cases cited n.12, *supra*.

the affirmative, remedial character of the right granted by Congress. Congress has not given district courts discretion to dismiss cases, merely because it is more convenient to do so. Rather, district courts have discretion to grant the relief sought, or to deny the relief sought, following a full trial on the merits. *See S. Rep. No. 1005, 73d Cong., 2d Sess.*, at 2, 5 (1934).

B. The abstention doctrine does not permit the abdication of jurisdiction over a declaratory judgment action merely because of the pendency of a parallel state court action.

The decisions of *Brillhart v. Excess Insurance Co.*, 316 U.S. 491 (1942), *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), and *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), reinforced by this Court's recent decisions in *McCarthy v. Madigan*, 503 U.S. 140 (1992), and *New Orleans Pub. Serv., Inc. v. New Orleans*, 491 U.S. 350 (1989), command a district court with valid jurisdiction to exercise that jurisdiction in declaratory judgment cases, except in the most exceptional circumstances.

Emphasizing the "unflagging obligation" to exercise jurisdiction, and that only the clearest of justifications would warrant abdicating that jurisdiction, this Court has directed lower courts to examine both choice of law and inadequacy of the state court proceeding in making an abstention decision. *Moses Cone*, 460 U.S. at 26, 28. Only "exceptional circumstances" will justify a district court's decision to stay a federal declaratory judgment action. *Id.*, 460 U.S. at 19. The mere pendency of a state court action

is not sufficient. Another aspect of this rule is that appellate courts should review *de novo* a district court's decision to abstain and not just review for abuse of discretion.

Moses Cone makes it clear that declaratory judgment actions must be viewed with the same unflagging obligation to exercise jurisdiction as is required with all other types of actions validly within federal jurisdiction. If district courts are permitted under any circumstances to stay declaratory judgment cases, that decision must be made within the limits prescribed by *Colorado River* and *Moses Cone*. *See also New Orleans Pub. Serv., Inc v. New Orleans*, 491 U.S. 350, 373 (1989) ("NOPSI") (reversing abstention decision where declaratory relief sought under federal law). Specifically addressing the issue of parallel actions in the state and federal systems, *NOPSI* recognized that, while the federal court's disposition of an action may affect or pre-empt a pending state action, "there is no doctrine that the availability or even the pendency of state judicial proceedings excludes the federal courts." 491 U.S. at 373.

Colorado River abstention is essentially a doctrine of convenience. *See Linda Mullenix, A Branch Too Far*, 75 GEO. L.J. 99, 103 (1986). While this Court has affirmed the application of *Colorado River* abstention in certain circumstances, this type of abstention is not based on the same comity principles at stake in traditional abstention cases, which involve complex state regulatory schemes, or untested state court statutes. *Colorado River* abstention is concerned with "wise judicial administration;" in other words, management of the district court's docket. Accordingly, it is most important that exceptional circumstances exist.

In the Declaratory Judgment Act, Congress has provided litigants with an affirmative remedy; a remedy that by its very nature invites pro-active, pre-emptive litigation. A decision to abstain under *Colorado River* because of the pendency of a later-filed parallel state court action, except in the most exceptional of circumstances, thwarts the legislative purpose behind the jurisdiction statutes and the Declaratory Judgment Act. Marine interests, despite the invocation of a legislatively sanctioned federal remedy, are being forced to try federal maritime claims in state courts. Abstention decisions in admiralty cases, merely because of the invocation of the Declaratory Judgment Act, have effectively abolished an important aspect of federal admiralty jurisdiction. This judicial usurpation of the legislative function cannot be tolerated.

III. When questions of federal maritime law are at issue, federal jurisdiction is mandated.

Critical to the abstention equation is choice of law. *Moses Cone*, 460 U.S. at 23. "[T]he presence of federal-law issues must always be a major consideration weighing against surrender." *Moses Cone*, 460 U.S. at 26. Questions of marine insurance are controlled by federal maritime law. Marine underwriters, seeking a declaration of rights and responsibilities under policies controlled by federal law have a right to proceed before a federal tribunal. Actions under the Limitation of Liability Act, 46 U.S.C. § 183c, are also commonly brought under the Declaratory Judgment Act. *See Sisson v. Ruby*, 497 U.S. 358 (1990); *Odeco Oil and Gas Co. v. Bonnette*, 4 F.3d 401 (CA5 1993); *Doucet & Adams, Inc. v. Hebert*, 1993 WL 8623 (E.D. La.,

Jan. 6, 1993) (Civ.A.No. 92-2375); *Complaint of Bird*, 794 F. Supp. 575 (D. S.C. 1992).

Because of the special need for predictability and reliability of rights and obligations in maritime commerce, the Admiralty Clause places maritime law and jurisdiction within the "judicial Power of the United States. . . ." U.S. CONST., art. III, § 2, cl. 3. The principle mandating uniform treatment of maritime cases is not a vacant theoretical requirement, but rather was designed to afford fairness to all maritime litigants by having their conduct and rights governed by the same rules:

[T]he convenience of the commercial world, bound together, as it is, by mutual relations of trade and intercourse, demands that, in all essential things wherein those relations bring them in contact, there should be a uniform law founded on natural reason and justice. . . .

One thing, however is unquestionable: The Constitution must have referred to a system of law co-extensive with, and operating uniformly in, the whole country. It certainly could not have been the intent to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

The Lottawanna, 88 U.S. (21 Wall.) 558, 575 (1875).¹⁵

¹⁵ See *Carnival Cruise Lines Inc. v. Shute*, ___ U.S. ___, 111 S.Ct. 1522, 1528, (1991) (upholding forum clause in a non-negotiated passage adhesion contract, because cruise ships have

While this Court has allowed state law to intrude on matters of marine insurance, the circumstances are not unlimited. Considerable interest in uniformity is preserved under *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 316-21 (1955). While the Maritime Law Association and other interested parties have advocated legislative refinement of the *Wilburn Boat* progeny, neither this Court's pronouncement nor any circuit law has abolished the doctrine of uniformity with regard to marine insurance.

As Justice Frankfurter observed in his concurring opinion in *Wilburn Boat*, nowhere is the need for uniformity greater than in the area of marine insurance:

The business of marine insurance often may be so related to the success of many manifestations of commercial maritime endeavor as to demand application of a uniform rule of law designed to eliminate the vagaries of state law and to keep harmony with the marine insurance laws of other great maritime powers.

348 U.S. at 323 (citations omitted).

Since this Court's decision in *Wilburn Boat*, marine underwriters have been faced with mounting uncertainty regarding the standards to which they, and their assureds, will be held. Except where a construction is "firmly entrenched" maritime law, *Wilburn Boat* directs the application of state law to the interpretation of marine insurance policies. *Wilburn Boat*, 348 U.S. at 316-21.

a right to protect themselves from the prospect of being forced to face lawsuits in a multitude jurisdictions).

The magnitude of unpredictability created by *Wilburn Boat* is enormous, for the making of a marine insurance agreement commonly involves international as well as interstate activities; and the ship's sphere of operations and the origins and ties of an injured person add further geographical contacts.¹⁶ Parties to maritime endeavors not only cannot predict whether federal maritime law or state law will apply to their insurance rights and obligations, but also are confronted with the additional uncertainty of which state may be deemed to have the "greatest interest in the resolution of the issues." *Taylor v. Lloyd's Underwriters of London*, 972 F.2d 666, 669 (CA5 1992); accord, *Illinois Constructors Corp. v. Morency & Associates, Inc.*, 802 F. Supp. 185, 188 (N.D. Ill. 1992) (citing cases), *Albany Insurance Company v. Anh Thi Kieu*, 927 F.2d 882, 890-91 (CA5), cert. denied, ___ U.S. ___ (1991).

In view of the global nature of maritime commerce and the variety of parties in insurance cases, it is difficult to determine which state or even which nation may ultimately be found to have the greatest interest. Moreover, the state with the greatest interest may decline to intrude its domestic regulations into the field of marine insurance

¹⁶ As observed by a district court: "Bearing in mind that ships, fishing vessels in particular, often operate in the waters of several or many states, to allow for different standards of coverage where trading limits have been breached according to where a vessel sank, or where the insurance policy providing coverage was issued, etc., would have a severely deleterious effect on uniformity in maritime law." *Lexington Ins. Co. v. Cooke's Seafood*, 686 F. Supp. 323, 328 & n.7 (S.D. Ga. 1987), aff'd, 835 F.2d 1364 (CA11 1988), quoted with approval in *Port Lynch, Inc. v. New England International Assurety of America, Inc.*, 754 F. Supp. 816 (W.D. Wash. 1991).

by specifically excluding marine insurance from its insurance regulations and providing that general maritime law is to govern such issues. See, e.g., *Lexington Ins. Co. v. Cooke's Seafood*, 686 F. Supp. 323, 328 (S.D. Ga. 1987), aff'd, 835 F.2d 1364 (CA11 1988); *Miller v. American Steamship Owners Mutual Protection and Indemnity Co.*, 509 F. Supp. 1047, 1049-52 (S.D. N.Y. 1981).

For example, the California legislature has specifically incorporated the traditional marine insurance concept of *uberrimae fidei* into its insurance code. Decisions in the Ninth Circuit, accordingly, regardless of whether a policy is construed according to general maritime or state law, are consistent with traditional marine concepts. The Fifth Circuit, on the other hand, has held that *uberrimae fidei* is no longer a traditional marine concept, and always applies state law. *Albany Insurance*, 927 F.2d at 890. Thus within the Fifth Circuit, the construction of a marine insurance policy may differ, depending on whether the lawsuit is filed in a federal district court in Texas or in Louisiana or in Mississippi.

Under English law, *uberrimae fidei* is the controlling requirement in the formation of a marine insurance contract: "A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party." The Marine Insurance Act, 1906, 6 Edw., Ch. 41, § 17 (Eng.). The English statute requires that the "assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured. . . . If the assured

fails to make such disclosure, the insurer may avoid the contract." *Id.* § 18.

Federal maritime law, particularly where marine insurance is concerned, is intended to follow the fortunes of English decisions, and is virtually identical to English law. *Queens Ins. Co. of America v. Globe & Rutgers Fire Ins. Co.*, 263 U.S. 487, 493 (1924); *Calmar S.S. Corp. v. Scott*, 345 U.S. 427, 442-43 (1953); *Puritan Ins. Co. v. Eagle S.S. Co.*, 779 F.2d 866, 870 (CA2 1985); *see also Steelmet, Inc. v. Caribe Towing Corp.*, 747 F.2d 689, 694-5 (CA11 1984), modified, 779 F.2d 1485 (CA11 1986); *Gulfstream Cargo, Ltd. v. Reliance Ins. Co.*, 409 F.2d 974, 980-82 (CA5 1969); *Royal Ins. Co. of America v. Cathy Daniels, Ltd.*, 684 F. Supp. 786, 790 (S.D. N.Y. 1988); *Reliance Knight v. U.S. Fire Ins. Co.*, 651 F. Supp. 477, 481 (S.D. N.Y.), *aff'd.*, 804 F.2d 9 (CA2 1986), *cert. denied*, 480 U.S. 932 (1987); GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* 55-56 (2d ed. 1975).

Marine insurance, by its very nature, requires consistent application. The entire shipping industry has a strong need for uniformity in coverage. Neither the interests of the insured ship nor of marine underwriters are served if coverage under a particular policy changes as a ship moves from jurisdiction to jurisdiction. If there is no consistency in the application of maritime law to marine insurance, policy interpretation will vary state to state.

It is anathema to the doctrine of uniformity to have an insured ship sail in and out of *uberrimae fidei* jurisdiction as it moves from Pascagoula to New Orleans to Port Arthur (a distance of little more than three hundred

miles). Furthermore, the Admiralty Clause does not countenance such a lack of uniformity between the law applied in the Fifth and the Ninth Circuits. To compound the lack of uniformity in current Fifth Circuit law, deprivation in the Fifth Circuit of a declaratory judgment mechanism to determine marine coverage obligations leaves insurers with absolutely no federal rights. State courts asked to apply traditional maritime concepts to coverage adjudication have had little impetus to do so. The Fifth Circuit has now sanctioned not only the abandonment of substantive federal law but has thrown marine insurers to the vagaries of state court adjudication by foreclosing the declaratory judgment mechanism for adjudication of coverage before a neutral federal forum. *Granite State*, 986 F.2d at 97 & n.5.

Similarly, the federal courthouse doors have been all but closed to the scores of maintenance-and-cure cases, merely because the employer has invoked the Declaratory Judgment Act. *See, e.g., Torch v. LeBlanc*, 947 F.2d 193, 196 (CA5 1991); *Rowan Companies, Inc. v. Griffin*, 876 F.2d 26, 28 (CA5 1989); *Lady Deborah Inc. v. Ware*, 855 F. Supp. 871 (E.D. Va. 1994); *Franklin v. Diamond Offshore Management Co.*, 1994 WL 144288 (E.D. La., Apr. 18, 1994) (Civ.A.No. 93-3940); *First Shipmor Assn v. Musa*, 1993 A.M.C. 2007 (N.D. Cal. 1993); *Rowan Companies, Inc. v. Meyers*, 1993 WL 218239 (E.D. La., June 14, 1993) (Civ.A.No. 93-1330); *Great Lakes Dredge and Dock Co. v. Ebanks*, 1994 WL 703489 (S.D. Ga., Nov. 28, 1994) (Civ.A.No. CV294-109).

The marine industry, by its very nature, has a strong need for uniformity. Vessels cannot operate in a national or global economy if there is no consistency in the application of maritime law. Accordingly, abstention should

require even more exceptional circumstances in maritime cases.

IV. Because the federal court has greater expertise and resources with regard to maritime issues, maritime interests should be permitted to choose a federal forum for the resolution of complex maritime disputes.

The final factor identified in *Moses Cone* is the inadequacy of the state court proceeding. 460 U.S. at 26. Because state court competence and procedures are presumed adequate, an adequate state forum is not an "exceptional circumstance" mandating surrender of jurisdiction. See *Deakins v. Monaghan*, 484 U.S. 193, 203 (1988); *Stone v. Powell*, 428 U.S. 465, 493-94 n. 35 (1976); see also Akhil R. Amar, *Parity as a Constitutional Question*, 71 B.U. L. Rev. 645, 646 (1991); Erwin Chemerinsky, Comment, *Ending the Parity Debate*, 71 B.U. L. Rev. 593, 602-03 (1991).

The purpose of this inquiry is "not to find some substantial reason for the *exercise* of federal jurisdiction by the district court; rather the task is to ascertain whether there exist 'exceptional circumstances,' the 'clearest of justifications,' that can suffice under *Colorado River* to justify the *surrender* of that jurisdiction." *Moses Cone*, 460 U.S. at 25-26. This factor does not require that the state forum be *inadequate*, in order to exercise jurisdiction, for an *inadequate* state forum *mandates* the *exercise* of federal jurisdiction. *Id.* at 26.

The federal courts have procedural advantages that the state courts cannot offer. The Supplemental Rules for Certain Admiralty and Maritime Claims are designed

specifically to address the special needs and concerns of the maritime community, and to insure uniformity of judicial proceedings in admiralty. Seizures are occasionally accompanied by an action for declaratory relief, such as when nonpayment for ship repairs, or for stores and provisions, is the subject of suit. The Rules on attachment and for actions in *rem* are peculiarly suited for the fluid nature of the maritime industry, with vessels travelling from port to port, within the same and different states.

The Federal Rules of Civil Procedure also provide maritime litigants with a procedural advantage unknown in state courts. Under Rule 4(k)(1)(B), service of process may be served within a 100 mile "bulge" of the judicial district in which suit is filed, regardless of state boundaries. This rule has particular application for maritime practitioners on the East Coast of the United States, who can reach from courthouses in New York to ports in Pennsylvania and New Jersey, and for practitioners on the Gulf Coast who can reach between Texas and Louisiana, Louisiana and Mississippi, even Louisiana and Alabama.

Maritime litigation frequently involves the probability of extensive foreign discovery. The need to resort to international treaties governing foreign discovery implicates federal court competence and indicates that state courts cannot claim any advantage over federal courts.

The limitations of discovery in an international dispute where the crew and other witnesses are transient and evidence is moving in commerce all the time, is only one area of special federal affinity to multi-jurisdictional

concerns. Indeed, federal courts are better suited to entertain suits with only passing connection to the venue, because their choice-of-law and jurisprudential doctrines are more firmly established and more cognizant of the concerns of international comity. Having to defend a case in a place remote from the parties, the witnesses and all the other evidence (including the vessel on which the accident allegedly occurred), vastly increases the cost and effort of participating in legal proceedings,¹⁷ but is sometimes appropriate.¹⁸

¹⁷ Increased cost and the possibility of not having access to essential evidence – for example, the vessel on which the plaintiff was allegedly injured – may not be the only prejudice suffered by maritime defendants deprived of recourse to the *forum non conveniens* doctrine. While in theory any court is required to apply the same federal maritime law, state courts have been known to substitute for established maritime law their own substantive rules, for instance a generic strict liability statute applied to a maritime tort. *See Green v. Industrial Helicopters, Inc.*, 593 So.2d 634 (La.), cert. denied, ___ U.S. ___ (1992).

¹⁸ In the recent *Waterman Steamship Corp. v. Chubb & Son, Inc.*, 1994 WL 50233 (E.D. La. 1994) decision, the district court refused to dismiss or stay a freight forwarder's declaratory judgment action involving general average. While a parallel action was pending in Egypt, where the ship was grounded, the earlier filed action was brought in the federal forum. None of the cargo originated in Louisiana, and Louisiana's only connection with the cargo claims was an occasional port of call and one of the New York forwarder's many places of business. However, the plaintiffs in the Egyptian proceeding were not Egyptian and were in fact all either American or foreign cargo underwriters trying to avoid obligations imposed by the forwarder's bills of lading and substantive United States law under which at least some of the cargo had been trans-shipped.

In maritime matters, the doctrine of *forum non conveniens* was developed in response to the exceptional scope of the maritime jurisdiction: In view of the plethora of fora in which maritime defendants may be found subject to jurisdiction, a counterbalancing limitation on the exercise of that jurisdiction was necessary to avoid impositions on the courts and the parties. *Alcoa Steamship Co. v. M/V Nordic Regent*, 654 F.2d 147, 154 (CA2), cert. denied, 449 U.S. 890 (1980).

One telling example is the application of *forum non conveniens* analysis where the operative occurrences, the witnesses, and the evidence lie outside the jurisdiction, but the defendant can be found in and haled before the forum. An accident aboard ship in transit between Cartagena and Vera Cruz, involving only Venezuelan cargo, can be brought in the United States if the ship is later found in a U.S. port and the consignor wants to sue here. It may not, however, be appropriate to entertain such a suit in the United States because our courts, state or federal, have no interest in adjudicating such a dispute between foreign nationals, involving only Venezuelan law, and the operative facts of which occurred outside United States waters.¹⁹

¹⁹ While this general-average hypothetical is based upon a real occurrence, the case settled early and there was never a ruling on the *forum non conveniens* motion made by the Mexican shipowner. However, international comity and jurisprudential concerns have always counseled for refusing to hear a case without any real connection to the venue in which suit was brought. *Gutierrez v. Diana Investments*, 946 F.2d 455 (CA6 1991) (injured Honduran seaman employed in Honduras by Panamanian corporation based in Greece to work on a Panamanian flag

Several of the states, including Texas, have refused to recognize the doctrine of *forum non conveniens*.²⁰ The forum shopping necessarily attendant to the conflict between state and federal fora will continue to engender the wasteful procedural jockeying that has already consumed an inordinate amount of judicial time and attention. *See, e.g., Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307 (CA5 1987), *rev'd on other grounds*, 486 U.S. 140 (1988), *appeal after remand*, 821 S.W.2d 190 (Tex. App. - Houston [14th Dist.] 1991), *writ granted*, 35 Tex. Sup. Ct. J. 684 (1992). There is a grave need for uniform application of the *forum non conveniens* doctrine in maritime cases because of the number of fora in which maritime defendants may be jurisdictionally "found."

vessel could not avail himself of United States jurisdiction for injuries suffered in Canadian (Great Lakes) waters, even though the vessel spent 20% of its time in United States ports); *Saloman Englander Y Cia, Ltd. v. Israel Discount Bank*, 494 F. Supp. 914, 918 (S.D.N.Y. 1989) (dismissal of suit on Israeli letter of credit because diversity jurisdiction was not intended to extend a forum to a dispute between one alien corporation and another merely present and doing business in the venue).

²⁰ *See, e.g., Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674, 677 (Tex. 1990); *Chick Kam Choo v. Exxon Corp.*, 821 S.W.2d 190, 194 (Tex. App. - Houston [14th Dist.] 1991), *writ granted*, 35 Tex. Sup. Ct. J. 684 (1992). Under Louisiana law, for another example, only "claims brought pursuant to [the Jones Act,] 46 [U.S.C.] § 688 or federal maritime law" are ineligible for *forum non conveniens* dismissal. LA. CODE CIV. PROC. ANN. art. 123(C). Maritime defendants are thus singled out and doubly disadvantaged in Louisiana and Texas by being deprived of both the state and federal doctrines of *forum non conveniens* if district courts are allowed to abstain except in exceptional circumstances.

"[F]ederal courts have developed a vast expertise in dealing with the intricacies of federal law, while the state judiciary has, quite naturally, devoted the bulk of its efforts to the evolution and refinement of state law and policy. It would be unreasonable to expect state judiciaries to possess a facility equal to that of the federal courts in adjudicating federal law." Martin Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 Yale L.J. 71, 75 n.15 (1984) (citations omitted). *See also* Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U. L. Rev. 67, 90.

Because the federal courts possess a greater expertise with maritime law, and have more resources available to accommodate the special needs of maritime litigants, the exercise of jurisdiction is mandated in maritime actions brought under the Declaratory Judgment Act. The Court should reject any approach that allows district courts, only nominally constrained by a highly deferential standard of review, to dismiss or stay a properly filed declaratory judgment action absent exceptional circumstances showing that the parallel state court proceeding is demonstrably better suited to settle the parties' dispute. *Moses Cone*, 460 U.S. at 25-26.

CONCLUSION

The decision in this case will affect the availability of declaratory judgments in both marine and non-marine cases. In order to fulfill the purpose for which the Declaratory Judgment Act was passed, the district courts should decide complaints for declaratory judgments and abstain only when there are exceptional circumstances. This rule also requires that appellate courts conduct *de novo* review of decisions to abstain, rather than a cursory examination for abuse of discretion.

Moreover, the Court's decision should recognize that additional factors favor the federal courts' exercise of their jurisdiction in declaratory judgment actions involving maritime matters. In these cases, retention of jurisdiction serves to promote the vital principle of uniformity and utilizes the greater expertise and resources of federal courts.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

JAN 12 1995

DEPARTMENT OF THE CLERK

LESLIE WILTON, ON BEHALF OF HIMSELF AND AS A REPRESENTATIVE OF CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON, AND CERTAIN INSTITUTE OF LONDON UNDERWRITERS COMPANIES, AS FOLLOWS, THE ORION INSURANCE COMPANY, PLC, SKANDIA U.K. INSURANCE PLC, THE YASUDA FIRE & MARINE INSURANCE COMPANY OF EUROPE, LTD., OCEAN MARINE INSURANCE CO., LTD., YORKSHIRE INSURANCE CO., LTD., MINISTER INSURANCE CO., LTD., PRUDENTIAL ASSURANCE CO., LTD., PEARL ASSURANCE PLC, BISHOPSGATE INSURANCE LTD., HANSA MARINE INS. CO. (UK), LTD., VESTA (UK) INS. CO., LTD., NORTHERN ASSURANCE CO., LTD., CORNHILL INSURANCE CO., LTD., SIRIUS INSURANCE CO. (UK), LTD., SOVEREIGN MARINE & GENERAL INSURANCE CO., TOKIO MARINE & FIRE INSURANCE (UK), LTD., TAISHO MARINE & FIRE INSURANCE CO. (UK), LTD., STOREBRAND INSURANCE CO. (UK), LTD., ATLANTIC MUTUAL INSURANCE CO., ALLIANZ INTERNATIONAL INSURANCE CO., LTD., and WAUSAU INSURANCE CO. (UK), LTD.,

Petitioners,

v.

SEVEN FALLS COMPANY, MARGARET HUNT HILL, ESTATE OF A. G. HILL, LYDA HILL, ALINDA H. WIKERT, and U.S. FINANCIAL CORP.,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

**BRIEF FOR *AMICUS CURIAE* INSURANCE
ENVIRONMENTAL LITIGATION ASSOCIATION
IN SUPPORT OF PETITIONERS**

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BRIEF FOR *AMICUS CURIAE* INSURANCE ENVIRONMENTAL LITIGATION ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

In this case, the Court is asked to depart from the principles in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) and *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983) to routinely permit abstention in federal declaratory judgment actions whenever a parallel state proceeding is present. This case is of great practical importance to the members of the Insurance Environmental Litigation Association ("IELA"), which are most of the nation's major property-casualty insurers.¹ IELA members need to be able to seek declaratory relief in federal court. Local passions can run deep in disputes about who should pay to clean up pollution that may alarm in-state residents and drain the treasuries of local companies and governments. Out-of-state or foreign insurers, such as IELA's members, may be seen as a "deep pocket," without local influence, capable of picking up the tab for the clean-up.

In IELA's experience, although most state courts strive in good faith to produce just results, some succumb to

¹ Since 1986, IELA has participated as *amicus curiae* in more than 300 cases addressing environmentally related insurance coverage issues. IELA submits this brief on behalf of IELA members: Aetna Casualty & Surety Company; Allstate Insurance Company; AIG Insurance Companies; American States Insurance Company; Chubb & Sons, Inc.; CIGNA Property & Casualty Companies; Continental Insurance Companies; Envision Claims Management Corporation (formerly Crum & Forster Corporation); Fireman's Fund Insurance Companies; Hanover Insurance Company; Hartford Insurance Group; Home Insurance Company; Liberty Mutual Insurance Company; Maryland Insurance Group; Prudential Reinsurance Company; Royal Insurance Company; St. Paul Companies; Selective Insurance Company of America; State Farm Fire & Casualty Company; Travelers Insurance Company; United States Fidelity & Guaranty Company; and Zurich-American Insurance Group.

the temptation of relieving a local governmental entity or business from the burden of cleaning up pollution without regard to the terms of insurance contracts. For example, one trial judge held that "the health, safety and welfare of the people of this State must outweigh the express provisions of the insurance policy in issue." *Summit Assocs., Inc. v. Liberty Mut. Fire Ins. Co.*, 550 A.2d 1235, 1239 (N.J. Super. Ct., App. Div. 1988) (reversing and quoting trial court).

In addition, disputes about where a case should be litigated are particularly common in environmental coverage cases, which involve numerous contacts with multiple jurisdictions.² The determination of which law applies is frequently outcome-determinative and major property and casualty insurers are susceptible to being sued in most, if not all, state forums. The protections against local bias afforded to litigants by federal courts are especially important in such cases. Giving insurers access to a federal forum in these disputes fulfills Congress's purposes in adopting diversity jurisdiction, allowing for removal, and enacting the Declaratory Judgment Act (the "Act").³

SUMMARY OF ARGUMENT

By adopting the Declaratory Judgment Act, diversity jurisdiction, and allowing for removal, Congress has constrained the discretion of federal courts to abstain from a suit for declaratory relief involving an out-of-state entity. To the extent judicial discretion to abstain survives Congress's enactments, it is because such discretion is part of the "common law background against which the statutes

² See, e.g., *Waste Management, Inc. v. Admiral Ins. Co.*, 649 A.2d 379 (N.J. 1994) (environmental coverage case involving Waste Management and 54 subsidiaries against 150 insurers concerning coverage for 97 sites in 22 states and Canada); *Westinghouse Elec. Corp. v. Liberty Mut. Ins. Co.*, 559 A.2d 435 (N.J. Super. Ct., App. Div. 1989) (environmental coverage case involving 144 insurers covering 81 contamination sites in 23 states for the period of 1948-82).

³ Both parties have consented to IELA's participation as *amicus curiae*. Letters of consent have been filed with the Clerk's office.

conferring jurisdiction" were adopted. *New Orleans Public Service, Inc. v. New Orleans*, 491 U.S. 350, 359 (1989). The *Colorado River/Moses H. Cone* factors, by setting forth the "exceptional circumstances" that may warrant abstention, embody these traditional equitable concepts. As this Court has repeatedly declared, federal courts have an "unflagging obligation" to hear cases over which they have jurisdiction, and may abstain only under "exceptional circumstances." *Colorado River*, 424 U.S. at 817, 813.

In this case, not only did the lower courts fail to undertake a searching review of the *Colorado River* and *Moses H. Cone* factors, but neither of their cursory, unpublished opinions even cited these cases. Instead, the courts below adopted an approach that would transform a situation *always* present in *Colorado River* abstention cases—a concurrent state proceeding—into an "exceptional circumstance."

Depriving litigants of a federal forum whenever a parallel state action is filed would contravene Congress's will. The lower courts cited concerns about "piecemeal litigation" and "reward[ing] . . . forum shop[ping]."⁴ But in granting out-of-state parties the right to seek declaratory relief in federal court, Congress understood that concurrent litigation could result, and that the federal courts' workload could increase. Moreover, while federal courts plainly retain the authority to guard against tactical maneuvering to secure a favorable forum, here Lloyd's simply filed a suit in a forum Congress explicitly afforded it, before Seven Falls sued in its preferred forum.

Concerns about bias and the perception of bias in state courts led the First Congress to give the federal courts authority over suits between citizens of a state and out-of-state parties. Congress has frequently examined, and

⁴ *Wilton v. Seven Falls Co.*, No. H-93-531, Joint App. 25 (S.D. Tex. July 2, 1993) ("Wilton"). "Joint App." refers to the Joint Appendix submitted by Petitioners Wilton, et al., and Respondents Seven Falls Company, et al., to accompany their briefs on the merits.

repeatedly affirmed, the role of diversity jurisdiction as a safeguard for non-local litigants. The right of an out-of-state entity to remove cases to federal courts complements diversity jurisdiction by ensuring that out-of-state defendants are afforded an opportunity to choose an unbiased forum in the federal courts.

The Declaratory Judgment Act further opens the doors of the federal courts for relief. It enables parties to bring disputes to the federal courts when they first arise, before either side has taken an irrevocable action or incurred avoidable cost. The Declaratory Judgment Act gives a federal court discretion to refuse relief on the merits or for reasons of justiciability. But the Act does not confer discretion on federal courts simply to decline jurisdiction in favor of a state forum, as the court below did.

The concerns that led to the enactment of diversity jurisdiction, removal procedures, and the Declaratory Judgment Act remain today. Authoritative studies of lawyers and judges reveal a widespread perception of bias in state courts against out-of-state parties, particularly corporate and insurance interests. The Court should reject any approach that allows federal district courts to negate the still-necessary and congressionally mandated protections of diversity jurisdiction, removal, and the Declaratory Judgment Act.

ARGUMENT

I. IN DECIDING WHETHER TO ABSTAIN IN A SUIT FOR DECLARATORY RELIEF, FEDERAL DISTRICT COURTS SHOULD EMPLOY THIS COURT'S COLORADO RIVER ANALYSIS.

Federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821); *see also New Orleans Public Service*, 491 U.S. at 358. The "constitutional principle that Congress, and not the Judiciary, defines the scope of federal jurisdiction" does not, however, eliminate "the federal court's discretion in determining whether to

grant certain types of relief." *Id.* at 359 (citation omitted) (emphasis supplied). The Court's abstention jurisprudence recognizes this discretion and sets forth the standards for exercising it in cases such as *Colorado River* and *Moses H. Cone*.⁶

There is no justification for departing from these well-established standards when assessing whether to abstain from actions filed under the Declaratory Judgment Act. Seven Falls is simply wrong in suggesting that the use of the word "may" in the Act confers broader discretion over the exercise of jurisdiction by federal courts in declaratory judgment actions. 28 U.S.C. section 2201(a) (1988 & Supp. V. 1993) (federal courts "may declare the rights and other legal relations of interested parties"). The word "may" permits a court to decline or grant declaratory relief on the merits. *Banas v. Dempsey*, 742 F.2d 277, 283 n.9 (6th Cir. 1984), *aff'd*, 474 U.S. 64 (1985) or to deny anticipatory relief on justiciability grounds. *See Golden v. Zwickler*, 394 U.S. 103, 108 (1969). The word "may" does not, however, permit a court to decline jurisdiction.

Colorado River and *Moses H. Cone* make clear that the "classes of cases" in which a federal court may decline to review an out-of-state entity's request for relief are "the exception, not the rule." *Colorado River*, 424 U.S. at 813; *Moses H. Cone*, 460 U.S. at 14-15. Only after a searching review of the *Colorado River/Moses H. Cone* factors may a federal court determine that abstention is warranted.⁶ The Fifth Circuit's approach would allow

⁶ The decision to abstain, though based on the facts of the particular case, is a purely legal determination. Review of that decision, therefore, must be based on a searching examination *de novo*. A district court cannot be permitted unfettered discretion to abrogate its responsibility to decide cases that are clearly within federal jurisdiction. *Moses H. Cone*, 460 U.S. at 19.

⁶ *Employers Ins. of Wausau v. Missouri Elec. Works, Inc.*, 23 F.3d 1372, 1374-75 (8th Cir. 1994); *Villa Marina Yacht Sales v. Hatteras Yachts*, 915 F.2d 7, 16 (1st Cir. 1990); *General Reinsurance Corp. v. Ciba-Geigy Corp.*, 853 F.2d 78, 81 (2d Cir. 1988);

federal district courts routinely to dismiss a declaratory judgment action due to “the existence of a pending state court proceeding in which the issues might be fully litigated.” *Wilton v. Seven Falls Co.*, No. 93-2608, Joint App. 29 (5th Cir. July 2, 1993). That approach would eviscerate Congress’s judgment and this Court’s admonitions.

A. The Colorado River Factors Are Closely Tied To The Considerations Traditionally Employed By Courts Of Equity In Deciding Whether To Grant Declaratory Relief.

Declaratory judgment was an equitable remedy present in English law and its precursors at least as early as the Fifteenth Century. Edwin M. Borchard, *The Declaratory Judgment, A Needed Procedural Reform, Part I*, 28 Yale L. J. 1, 12-14 (1918).⁷ Historically, in deciding whether to act, courts of equity balanced the inadequacy of the remedy available in the other (common law) forum against the undesirability of usurping the law court’s jurisdiction. Joseph Story, *Commentaries on Equity Jurisprudence*, § 33 (Reprint of 1836 ed.); John Norton Pomeroy, Jr., *Equity Jurisprudence*, §§ 39, 54, 132 (3d ed. 1905). If the petitioner’s remedy at law was inadequate, the equity court would overcome its reluctance to intrude into the jurisdiction of the common-law court.⁸ To assure justice

American Mfrs. Mut. Ins. Co. v. Edward D. Stone, Jr. & Assoc., 743 F.2d 1519, 1525 (11th Cir. 1984).

⁷ Although “declaratory judgment actions” as such did not formally exist in England until codified in the 1850s, courts of equity awarded relief that would today be considered declaratory in nature long before the United States came into existence. Borchard, *Procedural Reform* at 12-14.

⁸ Courts of equity needed the discretion to *deny jurisdiction* to avoid usurping the separate jurisdiction of the common-law courts. George L. Clark, *Principles of Equity with Supplement*, section 7 at 6 (1937). This power no longer exists due to Congress’s exercise of its authority to define the jurisdiction of the federal courts. What remains is the discretion of federal courts, under limited circumstances, “to determin[e] whether to grant certain types of relief.” *New Orleans Public Service, Inc.*, 491 U.S. at 359 (citations omitted).

and fairness for the petitioner, the equity court would then grant relief, even if the result of such relief was “piece-meal litigation” or other burdens on the parties or the court.⁹

The *Colorado River/Moses H. Cone* factors are rooted in these historic equitable concepts, but they apply somewhat differently in the modern context of a suit by an out-of-state party for declaratory relief in federal court. The competing forums are state and federal courts, not common law and equity courts (which are, of course, today merged).

Yet, the six *Colorado River/Moses H. Cone* factors reflect their equitable heritage. These factors elaborate on an equity court’s two basic considerations: adequacy of the remedy available in each forum and the desire to avoid unduly inconveniencing the parties. *See, e.g., Phoenix Mut. Life Ins. Co. v. Bailey*, 80 U.S. (13 Wall.) 616 (1871) (dismissing equitable action where legal remedy is available); *Verner v. Elvies*, 6 Dict. of Dec. 4788 (1610) (Scottish decision dismissing claim on grounds of inconvenience to the parties). The factors direct that, in determining whether to abstain, a court should consider whether: (i) another court has first assumed jurisdiction over real property; (ii) the federal forum would be extremely inconvenient to the parties; (iii) abstention might avoid piece-meal litigation; (iv) another court has obtained jurisdiction first; (v) state law is the source of law; and (vi) the state remedy is inadequate. *Moses H. Cone*, 460 U.S. at 15-16.

Thus, there may be a basis for a federal court declining to grant or deny declaratory relief where another court’s authority has been invoked first either with respect to real property (the first *Colorado River* factor), or generally

⁹ For example, before granting relief on the merits under the Scottish action for declarator, the precursor to English declaratory law, Edwin M. Borchard, *Declaratory Judgments* 125 (2d ed. 1941) (hereinafter “Borchard 2d”), the Scottish court could require the plaintiff to show: (a) a substantial interest at stake; (b) the rights asserted are in dispute; and (c) the desired declaration would serve a useful purpose in deciding or settling a dispute with *res judicata* effect. *Id.* at 127.

(the fourth factor). In such cases, both traditional fears exist—that the second (federal) court would be unable to resolve the dispute definitively and that its involvement could severely prejudice the parties, such as by leading to piecemeal litigation. *See American Int'l Underwriters v. Continental Ins. Co.*, 843 F.2d 1253 (9th Cir. 1988) (third and fourth *Colorado River* factors favor abstention); *Flather v. United States Trust Co.*, — F. Supp. —, 1994 WL 376088 at *1-2 (S.D.N.Y. July 15, 1994) (first and third *Colorado River* factors favor abstention).¹⁰ The determination whether to abstain, however, should be based on a careful review of the *Colorado River/Moses H. Cone* factors.

In contrast to a balancing of these traditional equitable considerations, the existence of a concurrent state court action cannot alone justify abstention. *Alabama Pub. Serv. Comm. v. Southern R. Co.*, 341 U.S. 341, 361 (1951) (“[I]t was never a doctrine of equity that a federal court should . . . dismiss a suit merely because a State court could entertain it”) (Frankfurter, J., concurring). By preserving diversity jurisdiction and adopting the Declaratory Judgment Act, Congress created the possibility of concurrent suits. This was not an unintended consequence; the specific goal of these enactments was to provide out-of-state entities with a *federal* declaratory remedy. Thus, Congress weighed and resolved considerations of burden to the courts when it determined the scope of federal jurisdiction. To reopen these questions in the courts’ evaluation of whether to exercise jurisdiction would improperly override Congress’s mandate. While the ancient English chancellor may have struck whatever balance he thought just, the modern federal

¹⁰ The fifth factor—the source of law—is also based on traditional equitable notions. If the common law supplied the adequate rule for decision, equity courts stayed their hand. *See e.g., Clark v. Lindemann & Hoverson Co.*, 88 F.2d 59, 60 (7th Cir.), *cert. denied*, 300 U.S. 681 (1937). Where the law of equity controlled, the courts of equity would retain jurisdiction even of a later-filed action and grant equitable relief. *See, e.g.*, John Norton Pomeroy, Jr., *Equity Jurisprudence*, §§ 181-82 (3d ed. 1905).

judge must implement Congress’s determination that the court should entertain an out-of-state entity’s claim for declaratory relief except in the special circumstances identified by the *Colorado River/Moses H. Cone* factors.¹¹

B. The Lower Court Erred In Failing To Weigh The *Colorado River* Factors To Assess Whether Exceptional Circumstances Justifying Abstention Exist.

This Court has said that, in assessing whether circumstances are sufficiently “exceptional” to warrant abstention, “[n]o one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required. Only the clearest of justifications will warrant dismissal.” *Colorado River*, 424 U.S. at 818-19 (citation omitted). The Fifth Circuit failed even to address these factors. It eschewed this Court’s test in favor of a circumstance that by definition is always present in *Colorado River* abstention cases. Essentially, the lower court determined that any federal court action for declaratory relief is presumptively invalid when a state court is available.

Here, even a cursory review of the *Colorado River/Moses H. Cone* factors reveals no exceptional circumstances and no clear justifications warranting dismissal. *Id.* at 819.

1. *Jurisdiction over real property.* The parties here are disputing insurance coverage, not the ownership of real property.
2. *Convenience of the respective forums to the parties.* Seven Falls, a Texas domiciliary, is not inconvenienced by having to litigate in the federal district court for the Southern District of Texas.
3. *Avoiding piecemeal litigation.* Had Seven Falls not filed the subsequent state court action, there would be no second suit. The federal action can

¹¹ In addition, where competing suits have been filed, a federal court might determine under another mechanism such as the doctrine of *forum non conveniens* that the case should not proceed. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

resolve all issues and no second suit is required. In any event, the mere existence of a later-filed state suit is insufficient to override the important federal policy embodied in the Act.¹²

4. *Order in which jurisdiction was obtained.* Lloyd's filed first. Accordingly, this factor strongly supports federal jurisdiction. While a district court plainly retains discretion to discourage improper tactical maneuvering, that is not what happened here. As soon as Lloyd's learned about the potential claim, it filed suit in federal court. In an effort to settle the dispute, that case was dismissed and then recommenced when Seven Falls notified Lloyd's of its intention to sue. By seeking resolution of this case in a federal forum in Seven Falls's home state, Lloyd's exercised a right that Congress granted to it in a dispute such as this one.
5. *Source of law.* That state law may control a case cannot mean that abstention is appropriate. Given this Court's decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), the federal courts in all diversity cases necessarily apply state law. Moreover, complex insurance coverage cases often first require a difficult determination as to choice of law. Federal courts are well-suited to this task, and to applying the law of a state other than the forum, if necessary.
6. *Inadequacy of the state proceeding.* Given Congress's grant to out-of-state parties of the right to litigate in a federal forum, a federal court may be required to exercise jurisdiction even if the state forum is adequate. This is particularly true where, as here, a foreign party is seeking access

¹² Should it somehow become necessary to join additional parties in a given matter, permissive federal joinder, *see Fed. R. Civ. P. 20*, and other procedural mechanisms could be used to include all of the necessary parties in the suit.

to the federal courts.¹³ State court competence and proceedings are presumed to be adequate; they are not an "exceptional circumstance." *See, e.g., St. Paul's Ins. Co. v. Trejo*, 39 F.3d 585, 589 (5th Cir. 1994). However, an inadequate state law forum *always* requires the exercise of federal jurisdiction.

C. Routine Abstention From Suits For Federal Declaratory Relief By Out-of-State Entities Would Yield Perverse Consequences.

As the course of events here illustrates, the lower courts' approach gives rise to many adverse practical consequences. First, routine abstention in favor of a state proceeding amounts to "reverse-removal," essentially negating 28 U.S.C. section 1441. Second, the lower courts' approach would encourage "gaming" tactics and cause more litigation, not less. Third, routine abstention would encourage parties seeking to defeat diversity to draw in peripheral non-diverse parties that might otherwise be absent from the litigation.

Congress granted diversity jurisdiction, complemented by the right of removal to out-of-state defendants, "to protect nonresidents from the local prejudices of state courts." 14A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction 2d*, section 3721 at 187 (1985).¹⁴ Congress permits out-of-state entities to have some say in where

¹³ *See S. Rep. No. 1830, 85th Cong., 2d Sess. 4 (1958), reprinted in 1958 U.S.C.C.A.N. 3099; see also American Law Institute Study of the Division of Jurisdiction Between State and Federal Courts 108 (1969) ("[I]t is important in the relations of this country with other nations that any possible appearance of injustice or tenable ground for resentment be avoided. This objective can best be achieved by giving the foreigner the assurance that he can have his cases tried in a court with the best procedures the federal government can supply and with the dignity and prestige of the United States behind it").*

¹⁴ That defendants may not remove cases brought in their home state demonstrates that protection against local bias is precisely the purpose of the right to remove. 28 U.S.C. section 1441(b).

their case is heard. But the approach below automatically deprives an out-of-state litigant of the federal forum Congress authorized. It amounts to "reverse-removal," *i.e.*, permitting an in-state defendant to "trump" a federal suit with a later-filed suit in its home state court.

In fact, that is precisely what happened here. Lloyd's sued in federal court as soon as it learned about the underlying claim. In reliance on the policyholder's promise to inform Lloyd's before it filed any coverage action, Lloyd's voluntarily dismissed its federal action to facilitate settlement discussions. As soon as it learned that the policyholder planned to sue in state court, Lloyd's recommenced this action. Seven Falls then crafted a suit in state court that defeated removal. Lloyd's Brief at 6 (seeking to defeat Lloyd's right to have this case heard in a federal forum, "the Hills misjoined in their later Travis County suit wholly unrelated causes of action by the Winkler County co-defendants against those parties' own insurers."). The Fifth Circuit's decision to defer automatically to the state forum, without even evaluating the traditional factors that define whether abstention is appropriate, rewarded Seven Falls's forum-shopping. As this case illustrates, the approach taken below would encourage "gaming" tactics and lead to more litigation, not less.

In addition, the lower courts' approach would create an incentive for the party seeking to avoid a neutral federal forum to unjustifiably join peripheral or even fraudulently implicated non-diverse parties to defeat removal. *See Carriere v. Sears, Roebuck & Co.*, 893 F.2d 98, 101-02 (5th Cir.), cert. denied, 498 U.S. 817 (1990); *Haines v. National Union Fire Ins. Co.*, 812 F. Supp. 93, 96 (S.D. Tex. 1993). A policyholder seeking to avoid a federal forum might implead a local insurance agent or other unrelated party. In short, individuals who might otherwise be absent from the litigation would be drawn into it for purely tactical reasons.

Lloyd's was willing to litigate this case in Seven Falls's home state. Lloyd's merely sought the protection of fed-

eral court, guaranteed to it by Congress. The lower courts here apparently believed that insurance coverage actions should be litigated in state courts only. Not only is that approach in conflict with Congress's mandate, but it would result in practical litigation problems as well. The decision below should, accordingly, be reversed.

II. PERMITTING ROUTINE ABSTENTION THWARTS CONGRESS'S LONGSTANDING DETERMINATION THAT THE FEDERAL COURTS HAVE JURISDICTION TO ENTERTAIN DECLARATORY JUDGMENT ACTIONS BETWEEN DIVERSE PARTIES.

Since the founding of the Republic, Congress has vested the federal courts with the responsibility of ensuring fairness in litigation between a local entity and an out-of-state party, whether foreign or domestic. In enacting diversity jurisdiction, Congress exercised a power expressly granted it in the Constitution. Although frequently attacked before Congress and in the courts, diversity jurisdiction remains an integral part of our federal system. In 1934, responding to the needs of the insurance industry, among others, Congress authorized federal courts to grant out-of-state and foreign parties declaratory relief in diversity cases. The balance Congress struck between the roles of federal and state courts would be upset if district courts were given virtually unlimited discretion to abstain from exercising jurisdiction.

A. The Concerns Giving Rise To Diversity Jurisdiction Demonstrate The Importance Of Affording Diverse Parties A Federal Forum.

The Framers, concerned about the fairness and quality of state courts, authorized Congress to vest federal courts with diversity jurisdiction. Diversity jurisdiction would ensure that the nation spoke with one voice on issues affecting foreign relations, promote national unity, and encourage commerce by making a federal court available to foreign merchants and other property owners.

1. The Framers Of The Constitution Recognized The Need For A Federal Remedy For Diverse Parties.

The Constitutional Convention in 1787 was keenly aware of the state courts' selective enforcement of national policies. State courts had routinely ignored the Treaty of Paris in 1783 with Great Britain. North Carolina, for example, barred former Loyalists from suing in state courts for the payment of debts—an outright breach of the Treaty. Catherine D. Bowen, *Miracle at Philadelphia* 220 (1986). Similar treaty violations occurred throughout the Confederation. Nine states exiled their Loyalists, while five disenfranchised them. *Id.* And, although the Treaty of Paris directly prohibited prosecutions for actions taken during the Revolutionary War, state court dockets were filled with treason prosecutions of Loyalists. *Id.* at 221. Moreover, state legislatures regularly enacted laws that benefitted residents, to the detriment of out-of-state and foreign interests, particularly creditors.¹⁵

Given this background, the delegates were highly conscious of the inadequacies and prejudices of the state courts. As one delegate noted, "the Courts of the States can not be trusted with the administration of the National laws." J. Madison, *Notes of Debates in the Federal Convention of 1787* 319 (Norton 1987) (comments by Randolph) (hereinafter "Notes"). Accordingly, all of the comprehensive proposals for a new federal constitution provided for a national judiciary. Charles C. Tansill, *Documents Illustrative of the Formation of The Union of American States*, H.R. Doc. No. 398, 69th Cong., 1st

¹⁵ For example, Virginia and North Carolina adopted laws making debtors almost impossible to reach. 8 Henning (Va. Stat.) 401, 402; Bowen, at 220. State admiralty judgments also were biased in favor of local interests. *United States v. Judge Peters*, 9 U.S. (5 Cranch) 115, 131 (1809). New Hampshire statutes allowed certain in-state litigants to secure review of judgments, even where the time for taking such action had expired. *Penhallow v. Doane's Administrators*, 3 U.S. (3 Dall.) 54, 62 (1795).

Sess. 955, 965, 968, 980 (1926). All but one proposal provided for federal jurisdiction over cases involving foreigners. *Id.* at 955, 968, 980. The Virginia plan, which served as the convention's template, specifically vested in the federal courts authority over cases in which "citizens of other states" may be interested. *Notes*, at 32.

Madison feared "what was to be done after improper Verdicts in State Tribunals obtained under the biased [sic] directions of a dependent Judge, or the local prejudices of an undirected jury." *Id.* at 72. The Convention apparently shared these fears; it adopted the diversity jurisdiction provision without challenge.¹⁶

2. The Ratification Debates Demonstrate The Importance Of A Federal Remedy For Diverse Parties.

The Anti-Federalists vigorously opposed the proposal to give federal courts authority over suits between citizens of different states. Diversity jurisdiction, they argued, would unduly impinge on the state courts, lead to the application of federal law to state causes of action, and require oppressive costs to defend federal cases, particularly on appeal. James William Moore & Donald J. Weckstein, *Diversity Jurisdiction: Past, Present and Future*, 43 Tex. L. Rev. 1, 4 (1965).

Federalists responded that the integrity of the Union required broad jurisdiction for the federal courts. Among others, Alexander Hamilton strongly defended the need for the judicial authority of the union to extend "to all those [cases] which involve the PEACE of the CONFEDERACY, whether they relate to the intercourse be-

¹⁶ James William Moore & Donald J. Weckstein, *Diversity Jurisdiction: Past, Present and Future*, 43 Tex. L. Rev. 1, 3 (1965). Ultimately, the proposed Constitution stated that the "judicial Power shall extend . . . to Controversies . . . between Citizens of different States . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. Const., Art. III, sec. 2.

tween the United States and foreign nations, or to that between the states themselves." Alexander Hamilton, James Madison & John Jay, *The Federalist Papers*, No. 80, at 403 (Bantam 1982) (1787-88) (Hamilton).

James Madison concurred. Referring to local courts during the Virginia convention on ratification, he remarked: "We well know, sir, that foreigners cannot get justice done them in these courts . . ." 3 Jonathan Elliot, *Elliot's Constitutional Debates* 583 (2d ed. 1836) (Madison) (hereinafter "Elliot"). Foreign merchants' justifiable fear of biased state tribunals, Madison said, had "prevented many wealthy gentlemen from trading or residing among us." *Id.*¹⁷

The Framers feared that local bias against foreigners could easily turn into bias against citizens of other States. John P. Frank, *Historical Bases of the Federal Judicial System*, 13 Law & Contemp. Probs. 3, 27 (Winter 1948) (hereinafter "Historical Bases"). The Framers therefore afforded similar protection to out-of-staters. As Hamilton put it, federal courts needed jurisdiction over those cases "in which state tribunals cannot be supposed to be impartial," such as cases between citizens of different states. *The Federalist: Papers*, No. 80, at 405 (Hamilton).

The structure and quality of state judiciaries also concerned the Framers. Madison spoke of the "tardy, and even defective, administration of justice . . . in some states." Elliot, at 533. Federalists were suspicious of state court judges, who were generally selected by and under the influence of the legislature, poorly paid, and in

¹⁷ In general, Article III was part of a comprehensive appeal to "most men of property." John P. Frank, *Historical Bases of the Federal Judicial System*, 13 Law & Contemp. Probs. 3, 14 (1948). Chief Justice Taft, for one, thought that Article III had been successful in that regard. When opposing changes to diversity jurisdiction in 1928, he told the American Bar Association that "no single element in our governmental system has done so much to secure capital for the legitimate development of enterprise, throughout the West and South," as diversity jurisdiction. A. T. Mason, *William Howard Taft: Chief Justice* 127 (1964).

office for a very short time. Felix Frankfurter, *Distribution of Judicial Power Between United States And State Courts*, 13 Corn. L. Q. 499, 520 (1928).¹⁸ "State judges holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws." *The Federalist Papers*, No. 81, at 412 (Hamilton). Placing diversity suits in federal court, it was believed, would protect aliens and out-of-staters from discriminatory treatment by the state legislatures and thus encourage commerce, among other things. See Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483, 495 (1928) citing Elliot, at 282.

3. *Congress's Enactment And Steadfast Retention Of Diversity Jurisdiction In The Face Of Numerous Challenges Demonstrates Its Commitment To Affording A Federal Forum To Diverse Parties.*

Exercising its mandates under Article III of the Constitution,¹⁹ when the First Congress convened in 1789, it immediately created the federal courts and vested them with jurisdiction in cases "where an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another state." Judiciary Act of 1789, Ch. 20, § 11-12, 1 Stat. 73, 78, 79. As Justice Story explained, Congress implemented the judgment, reflected in the Constitution, that the possibility of state bias

¹⁸ Legislatures were responsible for appointing judges in every state except Pennsylvania and Maryland. For a general discussion of the political influences on early state judiciaries, see Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483, 497 (1928).

¹⁹ The Constitution left it to Congress to decide whether to create inferior federal courts and, if so, how much authority to vest in such tribunals. See *Turner v. Bank of America*, 4 U.S. (4 Dall.) 8, 10 (1799); see also *Federalist Papers*, No. 80, at 408 (Hamilton) ("the national legislature will have ample authority to make such exceptions and to prescribe such regulations" as necessary to solve jurisdictional "inconveniences" [sic]).

made a neutral federal forum necessary under certain circumstances.

The Constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control . . . the regular administration of justice. Hence, in controversies . . . between citizens of different states . . . it enables the parties, under the authority of congress, to have the controversies heard, tried, and determined before the national tribunals.

Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347 (1816).²⁰

In fulfilling its constitutional responsibility, Congress has often reexamined diversity jurisdiction. Few areas of the administration of civil justice have been as frequently scrutinized. Although the availability of diversity jurisdiction has at times been limited,²¹ Congress has preserved and reaffirmed its central and original feature: that citizens of different states or countries are given the right to sue in federal court.

²⁰ This Court has also said that diversity jurisdiction helps guard against the perception of state bias, *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87-88 (1809) (Marshall, C.J.) and promotes national unity, *Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 354 (1855); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 580 (1856) (Curtis, J., dissenting).

²¹ Currently codified as 28 USC 1332. In all, Congress has amended the statute at least thirteen times. R.S. § 563, 629; c. 137 § 1, 18 Stat. 470 (1875); c. 373 § 1, 24 Stat. 552 (1887) (raised limit to \$2,000); c. 866 § 1, 25 Stat. 433 (1888); c. 231 § 24 para. 1, 36 Stat. 1091 (1911) (raised limit to \$3,000); c. 283 § 1, 48 Stat. 775 (1934); c. 726 § 1, 50 Stat. 738 (1937); c. 117, 54 Stat. 143 (1940) (added D.C., Hawaii and territories); c. 646, 62 Stat. 930 (1948); c. 740, 70 Stat. 658 (1956) (added Puerto Rico); P.L. 85-554, § 2, 72 Stat. 415 (1958) (raised limit to \$10,000, and clarified corporate citizenship); P.L. 94-583, § 3, 90 Stat. 2891 (1976) (clarified status of foreign states); P.L. 100-702, 102 Stat. 4642 (1988) (raised limit to \$50,000).

The right of an out-of-state entity to remove a case to federal court provides further evidence of Congress's desire to afford such parties the right to litigate in a federal forum. 28 U.S.C. § 1441. Removal has been part of American law since the Judiciary Act of 1789, and was considerably expanded after the Civil War. 14A Wright, Miller & Cooper, section 3721 at 187. Although since narrowed somewhat, removal remains an important, complementary tool to ensure the availability of a federal forum to out-of-state litigants.

The frequency and force of the attacks on diversity jurisdiction underscore that fixing the federal courts' role in litigation between local and alien parties is a political judgment and not simply a matter of judicial administration. Political judgments are the domain of Congress, not the federal judiciary.

Among others, Justice Frankfurter clearly understood the difference between what the federal judiciary may want in this regard and what it may permissibly do. Despite his call for the complete abolition of diversity jurisdiction by Congress, *Burford v. Sun Oil Co.*, 319 U.S. 315, 336 (1943) (Frankfurter, J., dissenting), Justice Frankfurter recognized that such determinations were "not my concern as a judge. They are the concern of those whose business it is to legislate, not mine." *Id.* at 337.

The rule adopted by the courts below, which would routinely and arbitrarily allow federal courts to deny worthy "suitor[s] access to a federal court" due to a later-filed state action, "disregard[s] a duty enjoined by Congress and made manifest by the whole history of the . . . United States courts based upon diversity of citizenship between parties." *Id.* at 336. The power to restrict diversity jurisdiction resides only with Congress, not individual district judges.

B. By Enacting The Declaratory Judgment Act, Congress Granted Out-Of-State And Foreign Parties The Right To Seek Declaratory Relief In Federal Court.

Where federal court jurisdiction exists, the Declaratory Judgment Act affords an opportunity to settle disputes in federal court when they first arise, before the parties have taken irrevocable actions or incurred avoidable costs and liabilities. Edwin M. Borchard, *Declaratory Judgments* xiii-xvi (2d ed. 1941). The Act was intended to provide foreign and out-of-state parties, such as Lloyd's, the ability to seek declaratory relief in federal courts. Congress understood that such relief gives insurers some influence over their own destiny by enabling them to file suit first, choose the forum in which their cause will be heard, and avoid potentially biased state juries.²²

Insurers have long favored declaratory relief. Although declaratory actions were not formally introduced into American jurisprudence until 1915, insurers among others immediately saw the advantage of such relief to them and their policyholders.²³ To illustrate, in the life insurance context “neither party should be obliged to wait until the death occurs to find out whether the policy is valid or void.” *Borchard 2d*, at 638. The seminal case on the

²² *Declaratory Judgments: Hearing on H.R. 5623 Before a Subcommittee of the Senate Committee on the Judiciary*, 70th Cong., 1st Sess. 73 (1928) (Submission by Edwin Borchard) (anticipating that the main claims arising under the Act would involve the “construction of mortgages, deeds, contracts, . . . insurance policies and documents of all types”); *Borchard 2d*, at 634-35 (When an insurance company “is a defendant or co-defendant with the insured, juries are apt to be swayed by sympathy and be partial to the plaintiff; hence insurers have found great advantage in . . . obtaining a declaratory judgment in an independent action . . .”); *see also id.* at 647-48.

²³ Charles Alan Wright, *Law of Federal Courts* 672 (4th ed. 1983) (“Declaratory judgments are probably sought most often in insurance and patent litigation”); Edward A. Purcell, Jr., *Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America, 1870-1958* 212 (1992) (“the declaratory judgment was particularly useful to the insurance industry”).

justiciability of declaratory judgment actions is an insurance case. *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270 (1941).

By 1934, more than half the states had enacted statutes that provided some form of declaratory relief. S. Rep. No. 1005, 73rd Cong., 2d Sess. 4 (1934) (“Since 1919, 34 States and Territories of the Union have enacted the declaratory judgment statute.”). Congress realized the importance of making declaratory relief available in the federal courts. The first proposal to create a federal declaratory remedy was in 1919. S. 5304, 65th Cong., 1st Sess. (introduced Jan. 7, 1919). It was introduced each year thereafter. As soon as doubts about its constitutionality were resolved, Congress enacted the Declaratory Judgment Act in 1934.²⁴

Congress was aware that a federal declaratory judgment action could result in concurrent suits being brought in both federal and state courts. In that event, Congress apparently intended that declaratory actions proceed to judgment.

[I]f they [state complainants] got their suit put through first, they would get their judgment in the suit. If on the other hand, the declaratory judgment was rendered first, it would be final res adjudicata between the parties and the [state] suit would become unnecessary.

Hearing on H.R. 10143 Before the House Committee on the Judiciary, 67th Cong., 2d Sess. 7 (1922) (Statement

²⁴ In 1933, the Supreme Court unanimously decided that declaratory judgment actions were appropriate as long as a “real and substantial” issue exists between adversary parties. *Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 288 U.S. 249, 264 (1933). The 73rd Congress then passed the federal Declaratory Judgment Act without any hearings and with little discussion. In fact, during the brief floor debate, the Chairman of the Senate Judiciary Committee merely referenced prior hearings for support. 78 Cong. Rec. 10565 (1934) (remarks of Senator King). Thus, the actual congressional deliberations on declaratory relief can be found in the prior hearings and the floor discussions of earlier proposals.

of Henry W. Taft, Chairman of the Committee on Jurisprudence and Law Reform of the American Bar Association).²⁵

Congress also knew that allowing federal courts to provide declaratory relief could substantially increase the burden on the federal judiciary. During the floor debates, Representatives repeatedly voiced their concern that this Act would burden the federal courts.²⁶ Overall, Congress believed that the benefits of such a new form of relief, for insurers among others, *Hearing on H.R. 5623*, 70th Cong., 1st Sess. 51 (1928), outweighed any burden on the federal bench resulting from the Act.²⁷

Congress passed that Act recognizing that it could lead to concurrent state and federal litigation, and that it had the potential to accelerate access to the federal courts. Congress also knew that its action affected the balance of power between state and federal courts.²⁸ In this case,

²⁵ See also 69 Cong. Rec. 2029 (1928) (remarks of Rep. LaGuardia, quoting from *Kings County Trust Co. v. Melville*, 216 N.Y.S. 278 (1926)). (“It is doubtful whether [a trial court] will enter declaratory judgment after a court of coordinate jurisdiction has already entered an order which is res judicata upon these parties, since the court may decline to pass declaratory judgment ‘for other reasons.’”). One Representative even believed that a subsequently filed declaratory action should bar the original state court action. See, e.g., 69 Cong. Rec. 2028 (remarks of Mr. Dempsey) (Upon the filing of a declaratory judgment action in federal court, “[a]ll [the first] court could do is to discontinue your first action.”).

²⁶ See, e.g., 69 Cong. Rec. 1681 (remarks of Rep. Johnson) (“If either party during a preliminary stage of a controversy can bring the matter into court, and thereafter there may be further litigation before the rights of the parties are determined, would you not have doubled the volume of litigation . . . [I]t seems to me you will have an increased volume of litigation.”)

²⁷ Declaratory relief, it was said, would result in the “expedition, economy, and simplification of judicial procedure.” 78 Cong. Rec. 8224 (1934) (remarks of Rep. Montague, sponsor of the 1934 Declaratory Judgment Act).

²⁸ When Congress passed the Declaratory Judgment Act in 1934, federal common law controlled the disposition of cases in federal court. See *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). Congress

the lower courts violated the Act’s purpose in deferring to a later-filed state action on the grounds that declaratory relief “would result in the piecemeal adjudication of the plaintiffs[’] and defendants’ coverage dispute and would reward plaintiffs’ attempts to forum shop.” *Wilton*, Joint App. 25.

III. THE CONCERNS LEADING CONGRESS TO ENACT DIVERSITY JURISDICTION AND THE DECLARATORY JUDGMENT ACT REMAIN OPERATIVE TODAY.

The concerns that motivated the Founders to vest diversity jurisdiction in the federal courts and Congress to adopt the Declaratory Judgment Act still exist today. Studies repeatedly show that lawyers, and even federal judges, continue to perceive state court bias against out-of-state and alien interests, particularly those with “deep pockets.”

The experience of insurers in state courts confirms this impression. Although most state judges work in good faith to achieve just results, insurers continue to experience injustices apparently explainable only by a bias against out-of-state corporations. In addition, state courts are more crowded and generally less well-equipped. Thus, practical reasons support what Congress has required: absent truly exceptional circumstances, federal courts should entertain requests by out-of-state entities for declaratory relief.

A. Out-Of-State And Foreign Parties Perceive Some State Courts As Continuing To Manifest Bias Against Them.

Authoritative studies have repeatedly documented the widespread perception that state courts are biased against out-of-state and foreign parties. One comprehensive 1992 study reported that fifty-four percent of plaintiffs’ attorneys reported bias against defendants in state court. Neal

apparently believed making this remedy available in federal court was so important that it was justified even if its invocation was outcome-determinative.

Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 Am. U. L. Rev. 369, 408-09 (Winter 1992). More than half of such plaintiffs' lawyers (51%) ascribed this bias to the defendant's out-of-state status. *Id.* Slightly less than half (45%) explained that the defendant's identity as a business or corporation gave rise to prejudice.²⁹ Almost half (45%) of plaintiff's lawyers chose to litigate in state court based on their belief that the state court would be biased in their favor. *Id.* Not surprisingly, perhaps, attorneys representing insurance companies were most likely of all defense attorneys to report out-of-state bias (59%). *Id.* at 413.³⁰

Judges share this perception of prejudice. A 1992 survey conducted by the Federal Judicial Center found that many federal judges believe state courts still are biased against non-resident litigants. Forty-eight percent of circuit judges and 40% of district judges believed that state court bias was at least somewhat of a problem. Federal Judicial Center, *Planning for the Future: Results of a 1992 Federal Judicial Center Survey of United States Judges*, at 4, 26 (1994). Thus, it appears that the perception of state court bias that motivated the adoption of federal diversity jurisdiction remains.

²⁹ A Minnesota study also found bias against the nature of the client to be the most important reason lawyers pursued their remedy in federal court. The third most important reason was prejudice against out-of-state interests. Douglas D. McFarland, *Diversity Jurisdiction: Is Local Prejudice Feared?*, 7 *Litigation* 38, 40 (Fall 1980).

³⁰ Other studies have reported similar results. A Virginia survey found that more than 60% of attorneys said that local prejudice against out-of-state plaintiffs was a reason for choosing federal courts. Note, *The Choice Between State and Federal Court in Diversity Cases in Virginia*, 51 Va. L. Rev. 178, 179 (1965). Forty percent of Chicago lawyers believed that fear of local prejudice was at least somewhat important in choosing federal court. K. Marks, *Honors Paper at Northwestern University*, printed in *Hearings on H.R. 9622 before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 265, 267 (1978).

In reality as well as perception, insurers have repeatedly been subjected to judicial determinations that appear explainable only by a state court's desire to find a deep pocket to reimburse local policyholders. This is especially true in cases addressing the availability of insurance coverage for large environmental clean-up projects. Such decisions have been strongly encouraged by local interests that may be harmed by pollution.

For example:

- The Wisconsin Assembly Committee on Natural Resources recently wrote the Wisconsin Supreme Court asking it to reconsider its insurance coverage decision on public policy grounds. A decision denying coverage, the Committee said, would "have a serious adverse effect upon state efforts to remediate contaminated sites." Letter from Wisconsin Assembly Committee on Natural Resources to Chief Justice Nathan S. Heffernan, Wisconsin Supreme Court (Aug. 4, 1994) (regarding *City of Edgerton v. General Casualty Co.*, 517 N.W.2d 463 (Wis. 1994)).
- The Pennsylvania Attorney General urged the Pennsylvania Superior Court to affirm the trial court, in part "[b]ecause this is an age of limited public finances, [and] this funding must come from the private sector, . . . in this instance funds should flow both from manufacturers and from the insurance industry" Brief of *Amicus Curiae* of Commonwealth of Pennsylvania, Department of Environmental Resources at 1-2, *Lower Paxton Township v. United States Fidelity and Guar. Co.*, 557 A.2d 393 (Pa. Super. Ct. 1989) (No. 141 Harrisburg 1988).³¹

³¹ See also Supplementary Brief of Respondent State of New Jersey, Department of Environmental Protection at 3, *State of New Jersey v. Signo Trading Int'l, Inc.*, 570 A.2d 980 (N.J. 1989) (No. 30,960), *aff'd*, 612 A.2d 932 (1992). (New Jersey's Department of Environmental Protection urged the New Jersey Supreme Court to decide an insurance coverage case in a manner "that will be consistent with the state's broad responsibility to remediate past contamination. . . .").

Perhaps in part because of these types of entreaties, state courts have at times succumbed to the temptation to have out-of-state and foreign insurers pick up the tab for cleaning up the environmental mess in their own backyard. *See, e.g., Summit Assocs.*, 550 A.2d at 1239 (reversing trial court holding that "the health, safety and welfare of the people of this State must outweigh the express provisions of the insurance policy at issue"). Yet, the orderly workings of insurance as an international economic mechanism allowing society to absorb massive risks depends on the reliability of insurance policy terms. In some recent state court cases, however, these considerations have taken a backseat to the desire to fund large local expenditures from an out-of-town source.

A few prominent examples demonstrate that state court bias remains a valid concern today:

- In *Greenville County v. Insurance Reserve Fund*, 443 S.E.2d 552 (S.C. 1994), the South Carolina Supreme Court held that, because there is more than one meaning listed for the word "sudden" in the dictionary, the term is ambiguous and must be construed against the insurer. *Contra MCI Telecommunications Corp. v. AT&T Co.*, 114 S. Ct. 2223, 2229-31 (1994).
- In *Morton International, Inc. v. Insurance Co. of North America*, 629 A.2d 831 (N.J. 1993), *cert. denied*, 114 S. Ct. 2764 (1994), the New Jersey Supreme Court barred insurers from ever enforcing an exclusion that had been part of many insurance agreements since 1970, when it had been approved by New Jersey's insurance regulators. The court based its "findings," that insurers had duped the regulators into allowing the exclusion, on biased and partisan articles written by counsel for policyholders. These articles and other materials were submitted for the first time on appeal, and were never subjected to discovery, cross-examination, or any of the other rules of evidence.

- In *West American Ins. Co. v. Tufco Flooring East, Inc.*, 409 S.E.2d 692, 698-700 (N.C. Ct. App. 1991), *review dismissed*, 420 S.E.2d 826 (N.C. 1992), the North Carolina Court of Appeals held that despite a policy provision defining "pollutant" as "any solid, liquid, gaseous or thermal irritant or contaminant including smoke, [or] vapor . . .," "vapors emanating from the flooring material" remarkably were not "pollutant[s]."
- In *Duhon v. Nitrogen Pumping & Coiled Tubing Specialists, Inc.*, 611 So. 2d 158 (La. Ct. App. 1992), despite a provision barring coverage for all actions that "result from the Assured's intentional and willful violation of any government statute, rule or regulation," the court found coverage for a suit in which the underlying claimants alleged that the policyholder was guilty of illegal and intentional pollution. *Id.* at 160 (Stoker, J., dissenting).

As these cases demonstrate, insurers have reason to persist in the belief that access to a federal forum is needed.³² Moreover, insurers face the same problem outside the environmental context. Most notably, state courts have abused the interpretive principle that contracts are construed against the drafter to justify anti-insurer rulings that simply ignore the terms of the agreement. For example, in *Ponder v. Blue Cross*, 193 Cal. Rptr. 632 (Ct. App. 1983), a California appellate court held that a claimant could recover for costs relating to treating TMJ (temporomandibular joint syndrome) despite a provision in her policy stating that benefits would not be provided

³² See also Willy E. Rice, *Judicial Bias, The Insurance Industry And Consumer Protection: An Empirical Analysis of State Supreme Courts' Bad Faith, Breach Of Contract, Breach-Of-Covenant-Of-Good-Faith And Excess-Judgment Decisions, 1900-1991*, 41 Cath. U. L. Rev. 325, 331 (Winter 1992) ("[T]hese supreme tribunals allow extralegal factors, which have little to do with the merits of the suits, to influence the disposition of insurance-related cases"); see also *id.* at 369 ("[S]tate supreme court justices unintentionally allow the types of insureds to influence the disposition of . . . actions").

for "the treatment of temporomandibular joint syndrome or disease." *See also, e.g., Northwest Airlines, Inc. v. Globe Indem. Co.*, 225 N.W.2d 831, 837 (Minn. 1975) (holding that "the very fact that the [parties'] respective positions as to what this policy says are so contrary compels one to conclude that the agreement is indeed ambiguous. The rule is well settled that ambiguous language should be strictly construed in favor of the insured.").

In recognition of the risk of local prejudice, Congress gave insurers such as Lloyd's the right to seek declaratory relief in a federal forum. The existence of that remedy is of real and continuing value. It helps promote the operation of national and international insurance business, with all of its benefits. It also aids commerce generally. This Court should not adopt an approach that would allow federal district courts to override that congressional determination.

B. State Courts Are In No Better Position To Hear Complex Environmental Coverage Actions Than Are Federal Courts.

Complex environmental cases involving numerous parties and high stakes are appropriate to resolution by the federal courts. As discussed above, environmental coverage cases frequently involve many parties, numerous geographically dispersed polluted sites, the law of multiple jurisdictions, and high stakes.³³ While state courts may be capable of handling such suits, these are precisely the types of cases over which the federal courts should exercise jurisdiction. Yet the rule adopted below would have fed-

³³ To illustrate, more than \$100 billion is at issue in the debate over the meaning of a single insurance provision—the pollution exclusion. Gary Spencer, *Pollution Coverage Suit Reinstated Against Insurer*, N.Y.L.J., Nov. 15, 1989, at 1. The question of who will pay to clean up America is a \$480 billion to \$1 trillion controversy. Milton Russell, E. William Colglazier, & Mary R. English, *Hazardous Waste Remediation: The Task Ahead* 15-16 (University of Tennessee Waste Management Research & Education Institute Dec. 1991).

eral courts abstain almost automatically from hearing such cases upon the subsequent filing of a claim in state court.

Federal courts are widely perceived as more suited to complex disputes. In one Chicago survey, ninety-two percent of lawyers ranked the ability of federal judges as the primary reason to litigate in federal courts. K. Marks, *Honors Paper at Northwestern University*, printed in *Hearings on H.R. 9622 Before the Subcomm. on Improvements in the Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 265 (1979). In the same survey, the second reason, cited by ninety percent, was the federal courts' more current calendar. *Id.* Federal courts are faster than state courts. While most states disposed of fewer cases than were filed with them from 1990 to 1992, National Center for State Courts, *State Court Caseload Statistics, Annual Report 1992*, at 13 (1994), federal courts have cleared more cases than have entered their system three of the last five years. Administrative Office of U.S. Courts, *Selected Reports, Annual Report of the Director* at 7 (1993).

Federal courts should not succumb to the temptation to defer to a later-filed state action based on the excuse that they are "too busy." *See generally Thermtron Prods. v. Hermansdorfer*, 423 U.S. 336, 344 (1976) (courts may not refer a case to a state court under the doctrine of *forum non conveniens* merely "because the district court considers itself too busy."). As busy as the federal courts may be, the state courts are more burdened. "Civil and criminal case filings are rising much more rapidly in state courts than in federal courts." *State Court Caseload Statistics* at 44. The state general jurisdiction judiciary handles over 83 times as many criminal cases and 41 times as many civil cases with only 15 times as many judges as the federal judiciary. *Id.*³⁴

³⁴ See Chief Judge Judith S. Kaye, "Federalism Gone Wild," N.Y. Times at A-29 (Dec. 13, 1994) (Reducing federal jurisdiction by limiting diversity and other restrictions "would serve the in-

CONCLUSION

By adopting diversity jurisdiction, providing for removal, and enacting the Federal Declaratory Judgment Act, Congress decided federal courts should be available for declaratory relief brought by out-of-state parties. This Court should therefore make clear that district courts may abstain only after a searching review of the *Colorado River/Moses H. Cone* factors. The existence of a concurrent state proceeding cannot be a sufficiently "exceptional circumstance" to warrant abstention. Thus, the decisions below should be reversed, and this case remanded with instructions to vacate the order of dismissal and recommence the litigation.

Respectfully submitted,

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stitutional interest of the Federal judiciary, but it would not be in the interest of the millions who turn every year to the state courts seeking fair and efficient resolution of their cases.").